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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

AUTOMOBILE IMPORTERS OF AMERICA, INC., *et al.*,
Petitioners,

v.

STATE OF MINNESOTA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

The Magnuson-Moss Warranty Act encourages manufacturers of consumer products to participate voluntarily in informal mechanisms for resolving warranty disputes. Pursuant to the Act, the Federal Trade Commission has established standards to govern such mechanisms.

The question presented is:

Whether the Magnuson-Moss Act and the federal regulations pre-empt provisions of Minnesota's motor vehicle warranty law that impose additional requirements regarding these mechanisms.

Parties to the Proceeding Below

Appellants:

Automobile Importers of America, Inc.; Alfa Romeo, Inc.; American Isuzu Motors, Inc.; BMW of North America, Inc.; Hyundai Motor Co. America; Jaguar Cars, Inc.; Mazda Motors of America (Central), Inc.; Mitsubishi Motor Sales of America, Inc.; Nissan Motor Corporation in U.S.A.; Peugeot Motors of America, Inc.; Porsche Cars of North America, Inc.; Rolls Royce Motors, Inc.; Saab-Scania of America, Inc.; Suzuki of America Automotive Corporation; Volvo of North America Corporation; and Yugo of America, Inc.

Appellees:

State of Minnesota and the Attorney General for the State of Minnesota

Amicus/Appellant:

Chrysler Corporation

Rule 28.1 Listing

Pursuant to Supreme Court Rule 28.1, a list of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of all corporate parties appears in the appendix to this petition at Pet. App. 80a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Automobile Importers of America, Inc. ("AIA"), and fifteen of its members, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 871 F.2d 717 and is reprinted in the appendix to this petition at Pet. App. 1a. The opinion of the United States District Court for the District of Minnesota is reported at 681 F. Supp. 1374 and is reprinted in the appendix at Pet. App. 18a.

JURISDICTION

The court of appeals entered judgment on March 17, 1989. On May 19, 1989, the Honorable Harry A. Blackmun, Associate Justice, entered an Order extending the time in which to file a petition for a writ of certiorari to July 15, 1989.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case, 15 U.S.C. § 2301 *et seq.* and Minn. Stat. Ann. § 325F.665 *et seq.*, along with pertinent federal regulations codified at 16 C.F.R. § 703, are set forth in the appendix to this petition at Pet. App. 36a, 69a, and 55a, respectively.

STATEMENT

This case involves a challenge to certain provisions of Minnesota's motor vehicle warranty law on the ground that the state legislation is pre-empted by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss Act"), 15 U.S.C. § 2301 *et seq.* (1982), and regulations issued pursuant thereto. In particular, petitioners sought to enjoin enforcement of provisions that, *first*, required all motor vehicle manufacturers doing business in the State to operate or participate in informal mechanisms for resolving warranty disputes (Minn. Stat. Ann. § 325F.665(6)(a) (West Supp. 1989)) and, *second*, required these mechanisms to conduct oral hearings within the State (*id.* at § 325F.665 (6)(e)).[1] The district court held that the Magnuson-Moss Act did not pre-empt the challenged state provisions.

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[1] Petitioners contested as well a Minnesota provision authorizing mechanisms to charge consumers a fee for use of the arbitration services. Pet. App. 76a.

Pet. App. 30a. The United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. 2a.

A. The Magnuson-Moss Warranty Act

The Magnuson-Moss Act embodies an extensive scheme to govern written warranties on consumer products. Through this legislation, Congress attempted to reduce consumer confusion over product warranties and to ensure meaningful access to remedies for breach of those warranties.[2] *See* S. Conf. Rep. No. 1408, 93d Cong., 2d Sess. 23 (1974); 15 U.S.C. § 2302(a) (1982). Congress sought to accomplish these objectives in a variety of ways: it established national disclosure standards for written warranties, *id.* at § 2302; defined federal content standards for designated warranties, *id.* at § 2304; and granted consumers a right of action to enforce warrantors' federal obligations, *id.* at § 2310(d)(1).

Recognizing that litigation is often costly and time-consuming, Congress looked for a way to make it economically feasible for consumers to pursue their warranty rights. The path Congress chose was to motivate manufacturers to develop informal arbitration mechanisms ("Mechanisms") by which warranty disputes could be resolved without protracted legal proceedings. 119

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[2] When a virtually identical bill was introduced in the Senate in 1970, its sponsors envisioned legislation that would, among other things, eradicate existing disuniformities among state warranty regulations:

> Forty-nine out of 50 States have some kind of warranty legislation. Usually they are not too far apart. But they ought to be standardized. Everything we are talking about that involves warranties moves in interstate commerce.

116 Cong. Rec. 22,485 (1970) (statement of Sen. Magnuson), Senator Magnuson agreed that his bill "[had] to do with one thing, and that is standardization by Federal formula of warranties and guarantees." *Id.* (statement of Sen. Baker; accord, Sen. Magnuson). *See* 119 Cong. Rec. 29,480 (1973) (statement of Sen. Moss) (incorporating cited legislative history by reference).

Cong. Rec. 29,480 (1973) (statement of Sen. Moss). In keeping with this goal, Section 110 of the Magnuson-Moss Act expressly provided: "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1) (1982).

Congress did not set out standards to govern these informal Mechanisms. Rather, it delegated to the Federal Trade Commission ("FTC") the responsibility for establishing "minimum requirements" for the Mechanisms. *Id.* at § 2310(a)(2). Congress did provide that, if a manufacturer chose to implement a Mechanism meeting the FTC criteria, it could require in its warranty that a consumer resort to the Mechanism before pursuing an action under the Act. *Id.* at § 2310(a)(3). Requiring prior resort to a Mechanism that falls short of the federal standard exposes a warrantor to all FTC enforcement powers, including an appropriate action for unfair or deceptive commercial acts or practices pursuant to section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). *See* 15 U.S.C. § 2310(b) (1982). In addition, the FTC, as well as the Attorney General of the United States, may bring an action in federal district court to enjoin a manufacturer from issuing a warranty that fails to comply with the Act or the accompanying FTC regulations. *Id.* at § 2310(c)(1).[3]

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[3] The Magnuson-Moss Act explicitly pre-empts any state law falling within the scope of its warranty labeling and disclosure provisions if the state regulation is not "identical" to the federal rule. 15 U.S.C. § 2311(c)(1) (1982). Moreover, Congress imposed FTC oversight upon States seeking to take part in the Act's warranty arbitration Mechanisms by directing that the forthcoming FTC regulations "provide for participation in such [informal dispute settlement] procedure[s] by independent or governmental entities," namely, state or local agencies. 15 U.S.C. § 2310(a)(2) (1982); *see* S. Conf. Rep. No. 1408, 93d Cong., 2d Sess. 26-27 (1974). Congress also included a general savings clause in

B. The FTC Regulations

Following its mandate from Congress, the FTC has prescribed standards to govern "the implementation and operation of any informal dispute settlement mechanism incorporated into the terms of a written warranty subject to the [Magnuson-Moss] Act." FTC Statement of Basis & Purpose, 40 Fed. Reg. 60,190 (1975); *see* 15 U.S.C. § 2310(a)(2) (1982). These regulations appear at 16 C.F.R. § 703 (1988).

The FTC does not compel a manufacturer to operate or participate in a Mechanism for informal warranty arbitration. The FTC noted that "Section 110 [of the Magnuson-Moss Act] does not require warrantors to establish complying informal mechanisms for resolution of consumer warranty disputes." FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,190. Instead, the FTC said, Congress has adopted a policy of " 'encourag[ing]' warrantors toward that end." *Id.* (citing 15 U.S.C. § 2310(a)(1)).

The FTC regulations thus apply to programs voluntarily undertaken by warrantors. If a warrantor elects to implement a Mechanism and to require consumers to exhaust that remedy before pursuing rights under the Act, the Mechanism must "be funded and competently staffed at a level sufficient to ensure fair and expeditious resolution of all disputes, and shall not charge consumers any fee for use of the Mechanism." 16 C.F.R. § 703.3(a) (1988). In addition, a Mechanism must meet detailed minimum requirements.[4]

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the Act, declaring that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." 15 U.S.C. § 2311(b) (1982).

[4] The regulations set out qualifications necessary for Mechanisms' decisionmakers, 16 C.F.R. §§ 703.4(a) & (c) (1988); direct Mechanisms' investigatory and discovery functions, *id.* at § 703.2 &

In setting forth the requirements applicable to such Mechanisms, the FTC repeatedly balanced the need for proposed procedures against the risk that they would make the Mechanisms too formal or too costly. For example, the FTC did not require Mechanisms to provide toll-free telephone numbers, preferring to allow "warrantors [to] choose the least costly, most effective option best suited to their commercial needs and current complaint handling patterns." FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,195. Likewise, the FTC declined to require more extensive disclosures about Mechanisms in the warranty, saying that its rule "strikes a reasonable balance between consumer and warrantor interests." *Id.* at 60,194.

The FTC considered—and expressly rejected—a provision that would have required Mechanisms to conduct oral hearings when resolving a dispute. Under the FTC rule, a Mechanism may entertain an oral presentation by a party "*only if* . . . [b]oth warrantor and consumer expressly agree to the presentation." 16 C.F.R. § 703.5(f) (1988) (emphasis supplied). The FTC leaves the determination of time and place for any such hearing to the agreement of consumer and warrantor. *See id.* at § 703.5 (f) (2) (i).[5]

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§ 703.5(c); and establish disclosure standards to ensure that consumers receive notice of their rights and obligations throughout the procedure, *id.* at §§ 703.5(a), (d), (f) & (g). Further, the FTC requires Mechanisms to render a decision within forty days of a dispute's referral. *Id.* at § 703.5(d). Additional regulations govern a Mechanism's recordkeeping, *id.* at § 703.6, and annual audits to verify compliance with FTC standards, *id.* at § 703.7.

[5] While decisions of these Mechanisms are not legally binding on either party, they are admissible as evidence in any subsequent civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism. 16 C.F.R. § 703.5(j) (1988).

C. The Minnesota Warranty Law

The Minnesota warranty law, insofar as it regulates private Mechanisms, differs from the federal law in several important respects. To begin with, the State mandates participation in warranty arbitration procedures. In Minnesota, an automobile manufacturer may not conduct business, enter into any franchise agreement for the sale of its motor vehicles, or offer an express warranty on automobiles that it sells in the State unless that manufacturer operates or participates in an informal dispute settlement Mechanism located in Minnesota. Minn. Stat. Ann. § 325F.665(6)(a) (West Supp. 1989).[6] The State also mandates that the Mechanism provide an oral hearing—whether or not the warrantor consents—unless the consumer elects to waive his or her personal appearance. *Id.* at § 325F.665(6)(e). Minnesota requires that the hearing be held within the State. *Id.*[7]

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[6] In 1987, Minnesota amended its existing warranty legislation to provide:

> Any manufacturer doing business in this state, entering into franchise agreements for the sale of its motor vehicles in this state, or offering express warranties on its motor vehicles sold or distributed for sale in this state shall operate, or participate in, an informal dispute settlement mechanism located in the state of Minnesota which complies with the provisions of the Code of Federal Regulations, title 16, part 703, and the requirements of this section.

Minn. Stat. Ann. § 325F.665(6) (West Supp. 1989). The State defines an "'informal dispute settlement mechanism'" as an "arbitration process or procedure" whereby a motor vehicle manufacturer attempts to resolve disputes with consumers "regarding nonconformities and repairs that arise during the vehicle's warranty period." *Id.* at § 325F.665(1)(f).

[7] Further, Minnesota authorizes Mechanisms to charge consumers a participation fee. Minn. Stat. Ann. § 325F.665(6)(i) (West Supp. 1989). *Cf.* 16 C.F.R. § 703.3(a) (1988) (prohibiting participation fees).

Minnesota recognizes a civil enforcement action for consumers injured by a manufacturer's failure to comply with any provision of the state warranty legislation. *Id.* at § 325F.665(9).[8] A manufacturer that fails to participate in an arbitration Mechanism, or participates in one that does not conduct mandatory hearings in Minnesota, risks not only private civil actions but also state enforcement proceedings prosecuted by the Attorney General. *Id.* See Minn. Stat. Ann. § 8.31 (West Supp. 1989). A manufacturer found to have violated any provision of the statute faces a civil penalty of up to $25,000. *Id.* at § 8.31(3).

D. Proceedings Below

Petitioners filed suit in the United States District Court for the District of Minnesota, alleging that the Magnuson-Moss Act and FTC regulations pre-empted various provisions of the Minnesota warranty law. The district court held otherwise. *See* Pet. App. 19a. The court found that petitioners had failed to "make . . . a showing" of any congressional intent to pre-empt state laws within the field of warranty dispute resolution, Pet. App. 26a-27a, and that the challenged Minnesota rules—including the requirements that warrantors operate Mechanisms and provide oral hearings—did not interfere with the objectives of the Magnuson-Moss Act. The district court thus granted summary judgment to respondents. Pet. App. 30a.

The Eighth Circuit affirmed. Although the court of appeals acknowledged a contrary decision by the Fourth Circuit—holding that Congress intended to pre-empt all state rules affecting warranty arbitration Mechanisms[9]

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[8] For a narrow category of actions arising under this legislation, consumers cannot commence civil proceedings without first exhausting a manufacturer's arbitration Mechanism. *See* Minn. Stat. Ann. § 325F.665(6)(a) (West Supp. 1989); *id.* at § 325F.665(3).

[9] The Eighth Circuit described the Fourth Circuit decision, *Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987), as resting on

—it chose to follow the lead of the Fifth Circuit, saying that Congress had not made a "clear statement" of intent to occupy this field. Pet. App. 8a. *Compare Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987), *with Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985). The Eighth Circuit specifically disagreed with the Fourth Circuit that the federal scheme was sufficiently comprehensive to support an inference that Congress intended to pre-empt that territory; to the contrary, the Eighth Circuit decided, "[t]he [FTC's] six pages of regulations are far from pervasive." Pet. App. 8a. Discovering no "clear statement" of federal pre-emption, the Eighth Circuit concluded, "We agree with the Fifth Circuit and the district court that Congress has not fully occupied the area of informal dispute resolution mechanisms." *Id.* at 10a.[10]

The Eighth Circuit also held that compliance with the Minnesota statute would not "frustrate[] the purposes and objectives of federal law." *Id.* at 12a. Although petitioners had argued that Congress sought to encourage a flexible, voluntary scheme for informal resolution of

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"alternative" grounds that the state common law fraud action challenged in that case would conflict with the enforcement of the FTC regulations and would frustrate the goal of national uniformity among standards controlling the validity of arbitration Mechanisms. *See* Pet. App. 7a. The Eighth Circuit, however, focused primarily on the Fourth Circuit's holding that the pervasiveness of the federal scheme compelled pre-emption of state regulation, emphasizing the "particular importance" which the Fourth Circuit had accorded to its conclusion that the "comprehensive details" of the federal regulation warranted pre-emption. *Id.*

[10] The Eighth Circuit bolstered this conclusion by reference to the Magnuson-Moss Act's general savings clause and its express pre-emption of state labeling and disclosure laws. Pet. App. 8a-9a. According to the court, these provisions defined the statute as "supplemental," rather than pre-emptive of further state regulation. *Id.*

disputes, the court took a different view of the Act and regulations. While it acknowledged Congress' "specific goal of encouraging warrantor participation in informal dispute resolution mechanisms," Pet. App. 15a, the court concluded that "[n]o . . . congressional policy of 'flexibility' exists in the adoption of the Magnuson-Moss Warranty Act." Pet. App. 14a.[11] Accordingly, the court ruled, Minnesota's decision to make Mechanisms mandatory did not frustrate any federal objective and, thus, was not pre-empted. Pet. App. 15a-16a.

The Eighth Circuit also upheld Minnesota's requirement that all Mechanisms conduct oral hearings within the State. The court conceded that federal law required the consent of both parties for an oral hearing. *See* 16 C.F.R. § 703.5(f) (1988). But it nonetheless found no federal objective that the Minnesota rule could impede, stating that "Congress and the FTC failed to provide a purpose for making oral presentations optional of both parties." Pet. App. 16a.[12] Determining that mandatory hearings do not interfere with the broad federal goal of consumer protection, the Eighth Circuit found no ground on which to pre-empt that element of Minnesota's warranty regulations. *Id.*[13]

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[11] For this reason, the Eighth Circuit distinguished *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), in which this Court held that a state regulation that denies or limits an option created by federal law is pre-empted.

[12] The Eighth Circuit rejected the reasoning in *Motor Vehicle Mfrs. Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988), which held that federal law pre-empted New York from empowering consumers to demand that a Mechanism conduct oral hearings. *See* Pet. App. 16a n.9. Acknowledging the *Abrams* court's reliance on its finding that mandatory oral hearings would thwart the federal purpose of fostering national mechanisms, the Eighth Circuit disagreed: "We find . . . that there is no legislative history to support the establishment of such a purpose." *Id.*

[13] The Eighth Circuit concluded as well that it was not impossible for warrantors to comply with both the Magnuson-Moss Act and the Minnesota regulations. Pet. App. 11a. While Minnesota con-

REASONS FOR GRANTING THE WRIT

This case presents important, unresolved issues about state authority to regulate private dispute resolution Mechanisms consistently with the Magnuson-Moss Act and regulations promulgated by the FTC. The Eighth Circuit—expressly adopting the views of the Fifth Circuit and rejecting the contrary views of the Fourth Circuit—held that the States have broad authority to regulate Mechanisms over and above the "minimum requirements" established by the Act and regulations. *See* Pet. App. 7a-10a (discussing *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, *supra*, and *Wolf v. Ford Motor Co.*, *supra*).

This holding merits review for several reasons. To begin with, it rests upon a misreading of federal law. The Act and regulations do not, as the Eighth Circuit thought, establish a regulatory floor beyond which States can regulate as they please; rather, as the Fourth Circuit realized, they strike a balance between interests of consumers and warrantors that added regulation (especially of the sort at issue here) necessarily upsets. Read properly, and with due regard for paramount federal interests, the Act and regulations are more than sufficient to require that state law be pre-empted. *See Taylor v. General Motors Corp.*, No. 87-5829 (11th Cir. June 14, 1989) (available on Westlaw) (to be reported at 875 F.2d 816) (no presumption against implied pre-emption).

The issue is also one of considerable significance. More than 40 States have assumed varying degrees of control over private Mechanisms, imposing a series of burdensome and inconsistent requirements that threaten to

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tradicts the federal scheme by mandating what Congress and the FTC left voluntary, the court took the view that a warrantor can comply with both sets of regulations simply by following Minnesota's more demanding rules. Pet. App. 11a-12a.

undermine the voluntary programs envisioned by Congress. The federal courts are already divided over the proper interpretation of the Act, and, without a definitive ruling by this Court, the boundaries between federal and state regulatory power will remain haphazard and indistinct.

1. *The Minnesota Law Upsets the Balance Established in the Magnuson-Moss Act and the FTC Regulations.*

We believe that, as a general matter, the Eighth Circuit got off on the wrong foot by giving too much deference to state regulation and too little to federal regulation. The court reasoned that "to infer pre-emption in an area traditionally regulated by the states—consumer protection through warranty law—requires a 'clear statement' of occupation." Pet. App. 8a. But the Eleventh Circuit has noted—quite correctly, in our view—that it is inappropriate to apply this high threshold to cases of implied (rather than express) pre-emption. *Taylor v. General Motors Corp.*, *supra*. The *Taylor* court pointed out that "in contrast to the strong presumption against pre-emption that we apply in determining whether the language of a federal statute or regulation expressly pre-empts state law, no such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights." *Id.* (citing *Felder v. Casey*, 108 S. Ct. 2302, 2306 (1988)). The refusal of the Eighth Circuit "to infer pre-emption" absent a " 'clear statement' of occupation" is too grudging a treatment of federal interests.

The Eighth Circuit compounded its error by seriously misapprehending the nature and purpose of the Magnuson-Moss Act. Noting that "Congress authorized the FTC to adopt only 'minimum requirements,' " Pet. App. 9a, the

court reasoned that Congress must have meant "to leave room for further state regulation." *Id.*[14] But the conclusion does not follow from the premise: in fact, Congress and the FTC meant the federal requirements to mark out the limit of regulation of any sort, leaving the development of further requirements to customers and warrantors themselves.

This is the reading given to the Act by the Fourth Circuit, in a decision that the Eighth Circuit declined to follow. *See Wolf v. Ford Motor Co., supra.* Although the Fourth Circuit acknowledged that Congress "ha[d] not explicitly preempted any state laws affecting private dispute settlement boards," it went on to find that "Congress' intent to preempt state regulation . . . can be inferred both from the pervasive nature of the federal regulatory scheme and from the conflict that would result" from allowing the particular state claim at issue there. 829 F.2d at 1279.[15] The court noted that "[t]he FTC regulations are extensive and address all facets of the mechanisms' operation . . .," concluding that "[t]hey leave no room for state regulation." *Id.* A federal district court has reached the same conclusion, finding a "clear intent that the federal regulations govern the mechanisms exclusively." *See Motor Vehicle Mfrs. Ass'n v. Abrams,* 697 F. Supp. 726, 736 (S.D.N.Y. 1988).

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[14] The court also said that "[t]he six pages of [FTC] regulations are far from pervasive" and that "[t]he special competence of the FTC to deal with unfair trade practices is unpersuasive in light of the states' traditional role in this area." Pet. App. 8a.

[15] Congress pre-empts state law either by explicitly stating its intent to do so or by creating a federal regulatory scheme so comprehensive as to support an inference of pre-emptive intent. *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n,* 109 S. Ct. 1262, 1273 (1989). Moreover, federal law pre-empts state law that interferes with the accomplishment of federal objectives. *Id.* Federal regulations no less than acts of Congress may pre-empt state law. *City of New York v. Federal Communications Comm'n,* 108 S. Ct. 1637, 1642 (1988).

Even the Fifth Circuit, with which the Eighth Circuit purported to side, has suggested that federal regulation is pre-emptive with regard to *private* Mechanisms. *See Chrysler Corp. v. Texas Motor Vehicle Comm'n*, *supra*, 755 F.2d at 1206. While the Fifth Circuit in *Chrysler* had before it a case involving a *state* Mechanism—and held that the Mechanism was not pre-empted by the Magnuson-Moss Act and FTC regulations—it drew a distinction between that kind of Mechanism and ones operated by warrantors themselves. The court thus stated: "We think it plain that the preclusive effect of section 110 [15 U.S.C. § 2310] is limited to rules governing informal dispute resolution procedures created by private warrantors and does not affect such schemes where provided as an option for consumers by state law." *Id.* Although the Eighth Circuit apparently thought otherwise, this language seems to align the Fifth Circuit more closely with the Fourth Circuit in its views regarding the pre-emptive effect of the Act and regulations.

The fact that Congress spoke in terms of "minimum requirements" does not mean, as the Eighth Circuit supposed, that state regulation must be permissible. This Court has observed that "[a] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986) (emphasis in original) (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). In each case, therefore, it is necessary to look at precisely what Congress sought to achieve in order to determine whether its purposes would be advanced or hampered by added layers of state regulation. "Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined

with action." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1355 (1988) (emphasis in original).

The federal policy regarding informal Mechanisms is clear from the Act and the regulations. Congress decided not to require that Mechanisms be created, or that Mechanisms be forced to follow one form and one form only; it chose, instead, "to encourage" the development of Mechanisms, 15 U.S.C. § 2310(a)(1), and to allow the FTC and the private marketplace to define the contours of those Mechanisms. Congress thus committed the task of developing appropriate "minimum requirements" to the FTC, which was well-positioned to assess both consumers' and warrantors' interests on a national basis. The standards fashioned by the FTC provide a benchmark against which Mechanisms can be measured, while allowing warrantors the option to develop additional standards to fit their particular circumstances.

It is true that state regulation often can coexist with federal "minimum requirements," but it is not always true, and it is not true here. What the Eighth Circuit failed to understand is that the Act and regulations have established a particular balance between the interests of consumers, on the one hand, and warrantors, on the other. In carrying out its statutory mandate, the FTC specified that Mechanisms would have to meet certain standards (if consumers must resort to them before suit), but it found that other proposed standards were incompatible with the federal plan. *See generally* FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,190-215. The FTC carefully weighed the possible benefits of each requirement against its potential to disrupt federal policy, repeatedly recording its effort "to find an equilibrium that keeps the burdens on manufacturers to a minimum while still sufficiently protecting the consumer." *Motor Vehicle Mfrs. Ass'n v. Abrams*,

supra, 697 F. Supp. at 735 (citing FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,190-215).[16]

Once that balance has been struck, it seems clear that additional state regulation—much less inconsistent regulation from 50 different States—cannot help but upset it. For example, two States (Kentucky and Minnesota) have required Mechanisms to provide oral hearings, *see* Ky. Rev. Stat. Ann. § 367.865(1) (Baldwin 1988); Minn. Stat. Ann. § 325F.665(6)(e) (Supp. 1989), despite the fact that the FTC expressly decided that such a requirement would place too great a burden on warrantors. FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,209. Other States have elected to require more extensive recordkeeping, or to establish tighter deadlines for resolving disputes. See pages 24-25, *infra*. These obligations have been imposed in the face of specific judgments by the FTC that such requirements were ill-advised. *See* FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,211-13.

The Eighth Circuit also disregarded the fact that the existence of Mechanisms, and the nature of their procedures, are closely intertwined with federal rights conferred under the Magnuson-Moss Act. Thus, as part of its effort to encourage voluntary creation of Mechanisms,

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[16] The Eighth Circuit summarily dismissed the FTC's assertions in the Statement of Basis and Purpose that its regulations sought to strike such a balance: "The statements of the FTC . . . are far from significant." Pet. App. 17a n.9. Instead, the Eighth Circuit preferred to rely on an informal opinion letter prepared by two FTC staff members suggesting that the Magnuson-Moss Act "was intended merely to supplement state law." Pet. App. 9a (citing letter from FTC's William P. Golden and Rachel Miller to Kevin Noland, Kentucky A.A.G. (undated)). Contrary to the Eighth Circuit's view, we think that the FTC Statement of Basis and Purpose deserves greater deference than an informal opinion letter released by two members of the FTC staff. As the District of Columbia Circuit has observed, "The statement of basis and purpose, as the only exposition of its reasoning the Commission itself issues, is where a court must look in order to identify the

Congress provided that warrantors could require resort to such Mechanisms as a precondition to suit under the Act, so long as the Mechanisms met the "minimum requirements" established by the FTC. 15 U.S.C. § 2310(a)(3). If individual States add to the requirements for Mechanisms, however, those requirements will interfere with the bargain extended by Congress, forcing warrantors to engraft the additional state requirements onto the Mechanism contemplated by section 2310, or to operate multiple Mechanisms (one to suit federal law and others to suit state laws), or simply to abandon the option of requiring "exhaustion" under that section. Nothing in the Magnuson-Moss Act suggests that Congress wanted warrantors to confront any such dilemma.

The States may believe that the FTC did not go far enough in its regulations, but that is ultimately a decision for the FTC, not the States, to make. As the New York district court stated, in a case involving the precise issue presented here: "Where Congress or a federal agency has striven to create a balanced relationship between competing interests through comprehensive statutory or regulatory treatment, state law that would upset that balance is pre-empted, whether it be statutory or common law." *Motor Vehicle Mfrs. Ass'n v. Abrams*, *supra*, 697 F. Supp. at 736. *See International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984); *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). Here, there can be no serious question but that *any* state regulation will disrupt the

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factors on which the Commission's decision was based." *American Optometric Ass'n v. Federal Trade Comm'n*, 626 F.2d 896, 905 (D.C. Cir. 1980). *See* Pet. App. 26a (district court in this case characterized letter as "non-binding"); *see also Motor Vehicles Mfrs. Ass'n v. Abrams*, *supra*, 697 F. Supp. at 737 (same).

balance embodied in the FTC regulations, modifying the federal system in favor of one selected by the States.[17]

We recognize, of course, that States generally may regulate for the benefit of their own consumers, but that fact cannot bear the weight given to it by the Eighth Circuit. First of all, although pre-emption is never to be lightly found, it is settled that state law may be pre-empted despite its asserted importance to the State. *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *see Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981); *Free v. Bland*, 369 U.S. 663, 666 (1962). Moreover, the Magnuson-Moss Act did not displace States from a specific field in which they had historically exercised regulatory power; to the contrary, at the time of the Act *no* State had undertaken any significant regulation of Mechanisms.[18] And, the subject of regulation (*i.e.*, Mechanisms) is not one of peculiarly local interest. Indeed, the FTC, in promulgating its regulations, took care to point out that several existing private Mechanisms were national in scope and deliberately tailored its regulations to preserve their national character. *See* FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at

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[17] Neither the Act's general savings clause nor its explicit pre-emption provision establishes that Congress intended to tolerate state interference with the federal balance. This Court has refused to read a general savings clause to preclude pre-emption of state laws that undermine carefully balanced federal regulatory schemes. *International Paper Co. v. Ouellette*, *supra*, 479 U.S. at 496-97. Moreover, the Act's explicit pre-emption of state regulation within a narrowly defined area does not signal that Congress intended to avoid pre-emption of state law in other areas addressed by the Act. *Motor Vehicle Mfrs. Ass'n v. Abrams*, *supra*, 697 F. Supp. at 732; *see Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, *supra*, 458 U.S. at 162.

[18] Indeed, the first state regulation of such Mechanisms did not appear until 1982, with Connecticut's "Lemon Law." Conn. Gen. Stat. § 42-179(j) (Supp. 1989) & *id.* at § 42-182 (1987 & Supp. 1989). Since then, more than forty other States have joined Connecticut in regulating these Mechanisms.

60,209 (regulations seek to "foster a variety of Mechanisms, including national ones").[19] It is thus incorrect merely to assume that, because Mechanisms affect consumers, Congress and the FTC must have regarded them as a subject for state regulation.

The pre-emption of direct state regulation does not mean that States have no voice in the operations of private Mechanisms. States may urge the FTC to develop different federal requirements or even request the affirmative authority to modify the requirements within their respective jurisdictions. *See* 15 U.S.C. § 2311(c)(2).[20] There is thus ample opportunity for States to play a role in the operation of Mechanisms affecting their consumers. What States may not do, however, is simply to claim the bulk of the field for themselves, concluding that the national interest is at an end once federal "minimum requirements" have been met.

2. *The Mandatory Requirements of the Minnesota Law Impermissibly Interfere with the Voluntary Program Established by Congress.*

Even if Congress had left room for additional state regulation of Mechanisms, the Minnesota statute would be invalid. It is well-established that a State, though having some regulatory authority, may not regulate in

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[19] The products affected by the Magnuson-Moss Act are almost all sold on a national basis, and the obligations of a warrantor thus cannot be readily divided state by state. This is especially true with regard to warranties on automobiles. Consumers themselves transport vehicles from State to State after purchase. Warranty arbitration Mechanisms as well tend to transcend state boundaries when organizing regionally. Thus, regulations that vary by state render it difficult to implement arbitration programs and to train personnel, since a single region may be governed by a number of inconsistent state regulatory schemes.

[20] Moreover, Congress specifically directed that the FTC, in its regulations, "shall provide for participation in such [informal dispute settlement] procedure by independent or governmental entities." 15 U.S.C. § 2310(a)(2) (1982).

a manner that "stands as an obstacle to the accomplishment and execution of congressional objectives." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1273 (1989). State laws are pre-empted to the extent that they conflict with a federal scheme. *See California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987).

It is readily apparent that, at some points at least, the federal scheme (embodied in the Act and regulations) and the Minnesota scheme (embodied in the statute) work at cross-purposes. Most obvious are provisions in the state statute that directly contradict judgments reached by the FTC. For example, as previously noted, the Minnesota law requires a Mechanism to provide oral hearings upon request of the consumer—a potentially cumbersome and costly requirement—even though the FTC has provided for oral hearings only if both warrantor and consumer agree. *Compare* Minn. Stat. Ann. § 325F.665(6)(e) *with* 16 C.F.R. § 703.5(f). This difference in approach results directly from the different weight given to local and national interests. In declining to mandate oral hearings, the FTC pointed out that such a condition would make it impossible for some national Mechanisms to operate and concluded that "the need to foster a variety of Mechanisms, including national ones, is greater than the need for oral presentations at the behest of the parties . . . ." FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,209. The State, reaching the opposite conclusion, simply assigned "national" concerns a lesser place.[21]

The imposition of costly procedures, like oral hearings, does little to advance the congressional purpose of encouraging voluntary Mechanisms. The FTC, in fact, has re-

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[21] In the same way, Minnesota substituted its own balance of the competing interests by authorizing Mechanisms to charge consumers a participation fee. Minn. Stat. Ann. § 325F.665(6)(i) (West Supp. 1989). The FTC explicitly forbids any such charge. 16 C.F.R. § 703.3(a) (1988).

peatedly recognized that costly measures would *dis*courage warrantors from establishing Mechanisms. The FTC thus declined to require Mechanisms to employ toll-free telephone numbers, reasoning that "[w]arrantors could choose the least costly, most effective option best suited to their commercial needs and current complaint handling patterns." *Id.* at 60,195. Similarly, the FTC resisted efforts to impose costly notification procedures upon warrantors, stating that "[r]educing [administrative] burdens would act to decrease costs thus posing an added incentive to warrantors to incorporate Mechanisms." *Id.* at 60,197. It refused to require more extensive disclosures about Mechanisms in the warranty, finding that its less-restrictive rule "strikes a reasonable balance between consumer and warrantor interests." *Id.* at 60,194.

The State of Minnesota, however, had its own antidote to any concern that increased costs would discourage voluntary Mechanisms: it made the Mechanisms *in*voluntary. This solution only makes matters worse. Although Minnesota can try to force warrantors to bear increased costs within the State, it has no power to control the conduct of Mechanisms on a national basis. Thus, if warrantors choose to compensate for the added costs in Minnesota by reducing costs elsewhere, one State will have effectively purchased more extensive procedures for its citizens at the expense of citizens in other States. The latter States, in turn, may then be forced into retaliatory regulation, mandating Mechanisms for their consumers and adding their own particular requirements. This patchwork of voluntary and involuntary Mechanisms, on a state-by-state basis, would bear little resemblance to the entirely voluntary system contemplated by Congress in the Act.

The Eighth Circuit nonetheless found no conflict between Minnesota and federal law. With regard to the requirement that all automobile manufacturers offer Mechanisms, the court flatly rejected the argument that

Congress meant to allow manufacturers to decide for themselves whether to offer Mechanisms, stating that "[n]o such congressional policy of 'flexibility' exists in the adoption of the Magnuson-Moss Warranty Act." Pet. App. 14a (distinguishing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, *supra*). With regard to the requirement of oral hearings, the court chose to allow the state law to stand, saying that "Congress and the FTC failed to provide a purpose for making oral presentations optional of both parties." Pet. App. 16a. Neither explanation is persuasive.

The notion that Congress had no "policy of flexibility" is simply mistaken. As we have said, Congress stated explicitly that its policy was "to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1) (1982). The FTC, likewise, noted that "[15 U.S.C. § 2310] does not require warrantors to establish complying informal mechanisms for resolution of consumer warranty disputes"; rather, said the FTC, "the legislative policy, set out in [section 2310(a)(1)], is to 'encourage' warrantors toward that end." FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,191. The framework envisioned by Congress, therefore, is one that depends upon voluntary decisions—adapted to the circumstances of particular industries—and "flexibility" in the creation of Mechanisms is a necessary part of that framework.

We also think that the difference between "encouraging" Mechanisms and mandating them is self-evident. While Congress obviously wanted warrantors to utilize Mechanisms, it is equally obvious that Congress thought regulatory force to be the wrong means for bringing about that end. Indeed, it seems unlikely that, if Congress was willing to have Mechanisms established involuntarily, it would have chosen the course of allowing every State to establish its own individual requirements,

rather than allowing the FTC to establish standards that could accommodate interests in uniformity as well. The fact that it gave the FTC no authority to require Mechanisms strongly suggests that it did not want such authority to be exercised at all.[22]

The court of appeals' treatment of the oral-hearing requirement is even more puzzling. The court seemed to acknowledge that federal law made such hearings conditional on the consent of both parties, but it gave that intention little effect because Congress and the FTC "failed to provide a purpose" for that condition. If the court meant to say that federal law cannot pre-empt contrary state law unless Congress (or an agency) explains the reason for the federal law, we think that its theory is too broad. Although this Court has noted that the purpose of federal law is relevant to the pre-emption inquiry, *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, *supra*, 109 S. Ct. at 1273, it has never held that Congress or an agency *must* delineate a purpose before the federal rule can be controlling. The primary role of a court is to determine what the federal rule is and whether state law is at odds with its terms. Here, there is no doubt about the rule—the FTC has said that oral hearings are to be held only with the consent of both parties—and no doubt that the Minnesota statute is in direct conflict with that rule.

In any event, this is not a rule without a purpose. As we have already pointed out, the FTC did not act upon a whim, but made oral hearings optional for a specific reason: to give the necessary flexibility to national programs. The FTC recognized that national programs

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[22] This Court elsewhere has recognized that where Congress and federal agencies seek to preserve flexibility in a regulated field by creating an option for those acting within that field, federal law pre-empts state regulation that limits or denies the benefit of that option. *See Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 270 (1985); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, *supra*, 458 U.S. at 155-56.

typically operated upon written submissions and that such programs could not, as a practical matter, provide oral hearings upon request. *See* FTC Statement of Basis & Purpose, *supra*, 40 Fed. Reg. at 60,209. "If every state could establish different and possibly conflicting regulations binding upon any mechanism operating within its borders or on behalf of its manufacturers, the federal purpose of fostering national mechanisms would be thwarted." *Motor Vehicle Mfrs. Ass'n v. Abrams*, *supra*, 697 F. Supp. at 739.

The plain fact is that a Mechanism cannot be both voluntary and mandatory, both national and local in scope. Where those policies conflict, it is federal law that must control. The Eighth Circuit, by its cramped reading of the Magnuson-Moss Act, has simply gotten matters backwards in this case.

3. *The Federal Program is Adversely Affected by Increasing State Regulation.*

The importance of this case cannot be measured just by its effect on warrantors in a single State. The need for federal pre-emption is even more compelling in light of the fact that more than forty other States have enacted warranty legislation within the past decade. Insofar as private Mechanisms are concerned, these "Lemon Laws" have substituted a mixture of varying and incompatible local regulations for the national policy that the Magnuson-Moss Act envisioned.

These Lemon Laws vary widely among themselves and almost invariably diverge from the FTC regulations. Thus, for example, Kentucky joins Minnesota in requiring participation in a warranty arbitration Mechanism that conducts hearings at a consumer's request. *See* Ky. Rev. Stat. Ann. § 367.865 (Baldwin 1988). Other States demand that more and different records be maintained. *See, e.g.*, Conn. Gen. Stat. § 42-182(c) (1987 & Supp.

1989); N.Y. Gen. Bus. Law § 198-a(8)(m)(3) (1988).[23] Many state Lemon Laws order Mechanisms to obtain certification from state attorneys general or other authorities and empower those officials to enforce the state—or even the federal—regulations.[24]

The effect on the federal scheme caused by one State's inconsistent regulation is, naturally, multiplied by the regulation of more than forty other States. The scheme set forth in the Magnuson-Moss Act rests in part on Congress' recognition that consumer products virtually always move across state lines and that manufacturers must therefore offer warranty services from one State to consumers in another State. 117 Cong. Rec. 39,819-20 (1971) (statement of Sen. Kennedy). Even if uniform among the States, this wealth of state regulation would interfere with federal objectives by preventing manufacturers from developing the procedures best suited for their products and markets. The disuniformity that actually exists severely undermines the objectives of the Magnuson-Moss Act by imposing mounting burdens on manufacturers distributing motor vehicles nationwide.

Now is a proper time to resolve whether these state laws can coexist with federal law. The federal courts

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[23] The amount of time allowed a Mechanism to resolve a dispute also varies among States. Under FTC rules, a decision must be reached within forty days. Connecticut extends the period to sixty days. Conn. Gen. Stat. § 42-182(b) (1987 & Supp. 1989). Rhode Island, by contrast, reduces the period to thirty days. R.I. Gen. Laws § 31-5.2-7 (1988).

[24] *See, e.g.*, Alaska Stat. § 45.45.355 (1986); Cal. Civ. Code § 1793.2(e)(3)(I) (West Supp. 1989); Fla. Stat. Ann. § 681.108 (1989); Ind. Code § 24-5-13-19(1) (Supp. 1988); Mont. Code Ann. § 61-4-511(1) (1986); Neb. Rev. Stat. § 60-2705 (1988); N.M. Stat. Ann. § 57-16A-6 (1987); N.Y. Gen. Bus. Law § 198-a (1988); N.D. Cent. Code § 51-07-18(3) (Michie Supp. 1987); Ohio Rev. Code Ann. § 1345.77(A) (Supp. 1988); Tenn. Code Ann. § 55-24-206(a) (Supp. 1988); W.Va. Code § 46A-6A-8(a) (1986); Wis. Stat. Ann. § 218.015(4)(b) (West Supp. 1988).

have reached differing conclusions, and review by this Court is appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-5131

AUTOMOBILE IMPORTERS OF AMERICA, INC.; ALFA ROMEO, INC.; AMERICAN ISUZU MOTORS, INC.; BMW OF NORTH AMERICA, INC.; HYUNDAI MOTOR CO. AMERICA; JAGUAR CARS, INC.; MAZDA MOTORS OF AMERICA (CENTRAL), INC.; MITSUBISHI MOTOR SALES OF AMERICA, INC.; NISSAN MOTOR CORPORATION IN U.S.A.; PEUGEOT MOTORS OF AMERICA, INC.; PORSCHE CARS OF NORTH AMERICA, INC.; ROLLS ROYCE MOTORS, INC.; SAAB-SCANIA OF AMERICA, INC.; SUZUKI OF AMERICA AUTOMOTIVE CORPORATION; VOLVO OF NORTH AMERICA; and YUGO OF AMERICA, INC.,

Appellants,

v.

STATE OF MINNESOTA AND THE ATTORNEY GENERAL FOR THE STATE OF MINNESOTA,

Appellees.

CHRYSLER CORPORATION,

Amicus/Appellant

Appeal from the United States District Court for the District of Minnesota

Submitted: October 19, 1988

Filed: March 17, 1989

Before HEANEY,* Circuit Judge, HENLEY, Senior Circuit Judge, and FAGG, Circuit Judge.

* The Honorable Gerald W. Heaney assumed senior status on December 31, 1988.

HEANEY, Senior Circuit Judge.

The appellants, an organization of foreign automobile manufacturers ("Automobile Importers"), brought suit in the United States District Court for the District of Minnesota, challenging a Minnesota consumer law. The law requires automobile manufacturers to participate in informal dispute resolution, including oral hearings at the consumer's option, and permitting the dispute resolution mechanisms to charge consumers a fee for their use. The district court held that the Minnesota law is not preempted by the Magnuson-Moss Warranty Act. The plaintiffs appeal that decision to this Court. We affirm.

I. BACKGROUND

A. The Magnuson-Moss Warranty Act

In 1974, Congress enacted the Magnuson-Moss Warranty Act governing written warranties on consumer products. 15 U.S.C. §§ 2301 *et seq.* Congress, recognizing that American consumers have been confused and misled by warranties,[1] adopted that Act to make warranties on consumer products more readily understandable and enforceable, and to provide the Federal Trade Commission (FTC) with means to better protect consumers. H.R. Rep. No. 1107, 93d Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7702. To achieve these goals section 110 of the Act encourages warrantors to establish informal dispute settlement mechanisms whereby consumer complaints are fairly and expeditiously settled.[2] 15 U.S.C. § 2310(a)(1). Congress recognized that

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[1] S. Rep. No. 151, 93d Cong., 1st Sess. 6 (1973).

[2] 15 U.S.C. § 2310(a) (remedies in consumer disputes) provides in part:

> (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer dis-

the Magnuson-Moss Warranty Act would create conflicts with state law rights and remedies and, therefore, set forth language to resolve such conflicts—broad savings clause with narrow preemption provisions.[3]

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putes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The [FTC] shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If—

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he [or she] incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he [or she] initially resorts to such procedure * * *.

[3] Section 2311 (b) and (c) provides:

(b) Rights, remedies, and liabilities

(1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c) State warranty laws

(1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—

[Continued]

Pursuant to 15 U.S.C. § 2310(a)(2) of this Act, the FTC adopted Rule 703 to promulgate "minimum requirements" intended to promote the independence of informal dispute resolution mechanisms. *See generally* 16 C.F.R. Part 703; H.R. Rep. No. 1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7722. Rule 703 permits manufacturers to require consumers to use its dispute mechanism before the consumer can seek direct redress from the warrantor. The Rule permits an oral hearing only if both parties consent. Each mechanism must be staffed and funded at sufficient levels to ensure fair and expeditious resolution. Each must also develop written operating procedures and make them available to consumers. Individual to the dispute. The mechanism will investigate disputes and must permit each party an opportunity to contradict facts submitted by the other party.

B. Minn. Stat. § 325F.665, subd. 6 (1987)

In 1987, the Minnesota Legislature amended the Minnesota lemon law.[4] Appellants challenge three aspects of the

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[3] [Continued]

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

[4] Minn. Stat. § 325F.665, sub. 6, provides in part:

(a) Any manufacturer doing business in this state, entering into franchise agreements for the sale of its motor vehicles in this state, or offering express warranties on its motor vehicles sold or distributed for sale in this state shall operate, or participate in, an informal dispute settlement mechanism located in the state of Minnesota which complies with the provi-

Minnesota law as being preempted by federal law: the requirement that automobile manufacturers doing business in Minnesota participate or operate such a mechanism; the provision of the law that permits either party, without the other's consent, to make oral presentations; and the provision allowing a consumer to be charged a fee for the mechanism.

II. DISTRICT COURT OPINION

Automobile Importers commenced an action in district court challenging the Minnesota law. They argued that the Magnuson-Moss Warranty Act leaves no room for state regulation of informal dispute resolution mechanisms, citing *Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987). The appellants also argued that *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) was controlling because the state law limited a federal option. The district court disagreed, relying in-

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sions of the Code of Federal Regulations, title 16, part 703, and the requirements of this section, the provisions of subdivision 3 concerning refunds or replacement do not apply to a consumer who has not first used this mechanism before commencing a civil action, unless the manufacturer allows a consumer to commence an action without first using this mechanism.

* * * *

(e) The informal dispute settlement mechanism shall allow each party to appear and make an oral presentation in the state of Minnesota unless the consumer agrees to submit the dispute for decision on the basis of documents alone or by telephone, or unless the party fails to appear for an oral presentation after reasonable prior written notice. If the consumer agrees to submit the dispute for decision on the basis of documents alone, then manufacturer or dealer representatives may not participate in the discussion or decision of the dispute.

* * * *

(i) A consumer may be charged a fee to participate in an informal dispute settlement mechanism required by this section, but the fee may not exceed the conciliation court filing fee in the county where the arbitration is conducted.

stead on *Chrysler Corp v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985), and distinguishing *Fidelity Federal*. In sum, the district court found that the Minnesota lemon law is not preempted under the established tests and, therefore, granted summary judgment to the State of Minnesota.[5]

III. DISCUSSION

A. Comprehensiveness of the Federal Scheme

A state law is preempted when the federal regulatory scheme is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see International Paper Co. v. Ouellette*, 479 U.S. 482, 897 (1987). In other words, the regulation must be sufficiently pervasive to demonstrate an intention on the part of Congress that it wished to displace state law.

Automobile Importers argue that such an intention can be inferred from the legislative history of the Magnuson-Moss Act. They argue that a compromise was struck in Congress between the interests of the warrantors and the interests of consumers, and that permitting Minnesota's private dispute resolution mechanism to stand upsets that compromise. Such a compromise may have well occurred, *see* FTC Statement of Basis and Purpose, 40 Fed. Reg. 60168, 60193 (Dec. 31, 1975), but Automobile Importers fail to provide sufficient evidence to support their assertion that an aspect of this compromise was the preemption of supplemental state

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[5] The district court also held that because the consequences of the Minnesota lemon law cannot yet be shown with specific facts, the appellants' taking claim is premature and was dismissed without prejudice. *Automobile Importers of America, Inc. v. State of Minnesota*, 681 F. Supp. 1374, 1381 (D. Minn. 1988) Appellants do not appeal this determination.

regulation in the area of private dispute resolution mechanisms.

Both the Fourth Circuit and the Fifth Circuit have faced the issue of preemption of state law by the Magnuson-Moss Warranty Act. In *Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987), the plaintiff alleged state common law that Ford had fraudulently represented that its private dispute mechanism, established pursuant to the Act, was an independent and impartial apparatus for resolving disputes between Ford and its customers. The character of the action required the court to determine if the mechanism operated fairly. The Fourth Circuit held that the state common law fraud action was preempted on three alternative grounds: (1) Congress' intent to preempt state regulation of informal dispute resolution mechanisms is inferred from the pervasive nature of the federal regulatory scheme; (2) allowing consumers to challenge the operation of dispute settlement mechanisms through state fraud actions would conflict with enforcement of the FTC regulations; and (3) to permit consumers to test the bona fide nature and validity of private dispute settlement mechanisms under the law of each state would completely frustrate the goal of national uniformity painstakingly designed by federal statute and regulation. The *Wolf* court noted, with particular importance, that the comprehensive details of the regulation demonstrate that any attack on the fairness or legitimacy of a dispute resolution mechanism must be through the FTC. *Id.* at 1279 n.3.

In the Fifth Circuit case of *Chrysler Corp. v. Texas Motor Vehicle Comm'n.*, 755 F.2d 1192 (5th Cir. 1985), Chrysler challenged the Texas lemon law, which granted, inter alia, automobile purchasers a proceeding before a commission made up of automobile dealers and consumers to assert certain new warranty remedies. The Fifth Circuit held that federal law does not occupy the field of informal dispute resolution for warranty dis-

putes. *Id.* at 1203-04.[6] The court based this finding on several conclusions: (1) consumer protection through warranty law is an area traditionally regulated by states —requiring a "clear statement" of Congress' intent to preempt; (2) neither the language of the Act nor the legislative history provide any such "clear statements;" and (3) section 111 of the Act preserves for consumers any rights or remedies created by state law. *Id.* at 1205-06. The Fifth Circuit summed up the effect that the Magnuson-Moss Warranty Act has on state-created informal dispute resolution mechanisms:

> We think it plain that the preclusive effect of section 110 is limited to rules governing informal dispute resolution procedures created by private warrantors and *does not affect such schemes where provided as an option for consumers by state law.*

Id. at 1206 (emphasis added).

We agree with the Fifth Circuit that to infer preemption in an area traditionally regulated by the states—consumer protection through warranty law—requires a "clear statement" of occupation. We find no "clear statements" of congressional intent to preempt here. The six pages of regulations are far from pervasive. The special competence of the FTC to deal with unfair trade practices is unpersuasive in light of the states' traditional role in this area. The fact that Congress gave some regulatory authority to the FTC over informal dispute resolution mechanisms fails, without any other supporting evidence, to demonstrate that Congress mandated national uniformity regarding such mechanisms.

The language, structure and history of the Act emphasize its supplemental, rather than preemptive nature.

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[6] The Fifth Circuit also held that the Texas scheme did not conflict directly with the Magnuson-Moss Warranty Act, nor did the Texas law interfere with the attainment of the full purposes and objectives of Congress in enacting section 110. *Texas Motor*, 755 F.2d at 1206.

Congress authorized the FTC to adopt only "minimum requirements," implying that it intended to leave room for further state regulation. The Act's structure is supplemental: a broad savings clause followed by language creating specific, narrow areas of preemption. By explicitly delineating a limited area of preemption, Congress intended to permit supplemental state regulation in areas outside of that delineation. Congress could have easily included informal dispute resolution mechanisms in its list of areas specifically preempted, but it failed to do so. The savings clause—"any right or remedy of any consumer under State law"—confirms Congress' intention to permit supplemental state regulation. Moreover, the legislative history supports the view that Congress found it necessary only to supplement present state law and not replace it. S. Rep. No. 1408, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7759. *See also*, H.R. Rep. No. 1107, 93rd Cong., 2d Sess. *reprinted in*, 1974 U.S. Code Cong. & Admin. News 7726 (the expansion of the FTC's jurisdiction in Title II is not intended to occupy the field of consumer protection). Finally, the FTC, in an informal opinion letter to the Attorney General of Kentucky, confirmed the view that the Magnuson-Moss Warranty Act was intended merely to supplement state law.[7]

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[7] The relevant parts of the FTC opinion letter provide:

> Kentucky's requirement of oral hearings clearly is not expressly preempted by the Warranty Act. Section 111(c)(1) of that Act states the *very limited circumstance* in which a state requirement will be preempted. That is where: (1) the state requirement concerns labeling or disclosure of written warranties or of performance under written warranties; (2) the requirement falls within the scope of a requirement of Sections 102, 103 or 104 of the Warranty Act or a rule thereunder, that is, of the federal labeling or disclosure provisions; *and* (3) the state requirement is not identical to the federal requirement. The Kentucky requirement for oral hearings in dispute settlement mechanisms is not a labeling or disclosure requirement. Also, it does not fall within the scope of Sections

We agree with the Fifth Circuit and the district court that Congress has not fully occupied the area of informal dispute resolution mechanisms.

102, 103, or 104 of the federal Act or release thereunder. It falls solely within the scope of Section 110 and of the rule implementing that section. There is no express provision in the federal Act for preemption of such a requirement.

* * * *

STATE LAW SAVINGS CLAUSE: SECTION 111(b)(1)

In addition to the express delineation of the intended area of preemption in Section 111(c)(1), Congress created an express savings clause for state laws in Section 111(b)(1). That section preserves "any right or remedy of any consumer under State law . . . ." The Kentucky procedure is a right or remedy of consumers under the state law, and as such, is expressly preserved under [this Section] of the Warranty Act . . . .

Chrysler has argued that Congress meant only to preserve state-created rights and remedies as to areas of warranty law where Congress and the Commission have not acted. There is no basis for this interpretation either in the language of the law or in its legislative history. The law itself makes clear that the preservation of consumer rights and remedies is paramount: it not only sets no limitation on the savings clause for state-created rights and remedies, but it expressly subordinates the preemption provision to the savings clause. *Also, the legislative history of the federal law shows that Congress anticipated additional state legislation even in areas where Congress has acted.* For example, the Senate Committee report suggests that a state would be allowed to mandate a type of warranty (such as a "full" warranty) that the federal law describes, but does not require. [S. Rep. No. 151, 93d Cong., 1st Sess. 26 (1973) (this discussion related to a version of the preemption provision that was more broadly preemptive than the version eventually adopted).]

* * * *

The Warranty Act and its history show no Congressional intent whatsoever to occupy the field of warranty law, or even to exercise exclusive jurisdiction as to those aspects of warranty law addressed in the Act. On the contrary, as discussed above, Congress incorporated an express provision that strictly defines the areas of state law which were to be preempted. This provision was revised and narrowed numerous times in

B. Physical Impossibility

Compliance with both the Minnesota law and federal law is possible. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Minnesota requires automobile manufacturers to establish or participate in an informal dispute resolution mechanism satisfying FTC requirements. Federal law makes warrantors' participation in such mechanism optional. Strictly speaking, compliance with both laws is not a physical impossibility. When an automobile manufacturer complies with Minnesota's law by providing an informal dispute mechanism, that manufacturer is not violating federal law.

In addition, 16 C.F.R. § 703.5(f) provides that an informal dispute resolution mechanism may allow an oral presentation by a party to a dispute only if both the warrantor and the consumer expressly agree to the presentation. Minn. Stat. § 325F.665, subd. 6(e) provides that Minnesota's required informal dispute resolution mechanism shall allow each party to appear and make an oral presentation in Minnesota unless the consumer agrees otherwise. Again, compliance with both laws is not impossible. *Chrysler Corp. v. Armstrong*, No. 83-45, slip op. at 1 (E.D. Ky. Apr. 30, 1985); FTC Staff Opinion attached to *Chrysler Corp. v. Armstrong*, No. 83-45, slip op. (D.Ky. Apr. 30, 1985). If the warrantor and the consumer abide by the Minnesota rule,

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successive drafts of the bill. Furthermore, as noted, Congress included a broad savings clause, expressly preserving a wide range of state laws that give consumers rights and remedies not provided by the federal law. In such a context, a finding of implied preemption must be based on strong evidence of a necessary conflict with the federal Act or rule.

FTC Staff Opinion attached to *Chrysler Corp. v. Armstrong*, No. 83-45, slip op. (D.Ky. Apr. 30, 1985) (emphasis added) (footnotes omitted); *see Motor Vehicle Manufacturers Ass'n. of the United States, Inc. v. Abrams*, No. 86 CIV 9592 (LBS), slip op. at 16-17 (S.D. N.Y. Oct. 13, 1988).

then the FTC rule is not violated. The appellants provide no evidence that the FTC intended to prevent states from requiring oral presentations. FTC Staff Opinion attached to *Chrysler Corp. v. Armstrong*, No. 83-45, slip op. (D.Ky. Apr. 30, 1985).

Finally, Minn. Stat. § 325F.665, subd. 6(i) provides that a consumer may be charged a fee for participating in a dispute mechanism, while 16 C.F.R. § 703.3(a) provides that a consumer shall not be charged any fee for use of such mechanisms. Compliance with both laws is possible even though the state has provided an option where the federal government has not. The lack of actual conflict between the Minnesota law and federal law, in all three instances, differs little from the lack of actual conflict in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 143 (1963) (a state law allowing avocados to be picked for commercial use only after a certain ripeness is not in actual conflict with a federal law that permitted the picking of avocados both before and after the state level of ripeness).

C. Compliance with State Law Does Not Frustrate the Purposes of Federal Law

State legislation is preempted if compliance with the state law frustrates the purposes and objectives of federal law. To determine this, we must analyze separately each aspect of the state law complained of by the appellants. The purpose of the Magnuson-Moss Warranty Act is to enhance consumer protection, and the specific goal of section 110 is to encourage warrantors to use informal dispute resolution mechanisms. H.R. Rep. No. 1107, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7702 and 7722.

1. Required Participation in a Dispute Mechanism

The appellants argue that *Fidelity Federal Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141 (1982), stands

for the proposition that a state law limiting the availability of a federally-created option frustrates Congress' objectives and purposes.

In *Fidelity Federal*, the Supreme Court in 1982 concluded that limitations placed on "due-on-sale" clauses in loan instruments by the California Supreme Court are preempted by Federal Home Loan Bank Board [Board] regulation permitting federal savings and loan associations to use "due-on-sale" clauses in their mortgage contracts. *Id.* at 679.

During the middle-1970's, the Board expressed concern over the power of a federal savings and loan association to exercise a "due-on-sale" clause in light of state law limitations. In 1976, the Board issued a regulation explicitly *permitting* federal savings and loan associations to use a "due-on-sale" clause if so desired. 12 C.F.R. § 545.8-3(f). The Board specifically intended to eliminate state restrictions on a savings and loan's ability to accelerate a loan upon transfer. 41 Fed. Reg. 6283, 6285 (1976). The Board further explained its intent that the "due-on-sale" practices of federal savings and loan associations be governed "exclusively by Federal law." 41 Fed. Reg. 18286, 18287 (1976).

In 1978, the California Supreme Court found that a lender's exercise of a "due-on-sale" clause violated a state prohibition against unreasonable restraints on alienation, unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default. *Wellenkamp v. Bank of America*, 582 P.2d 970, 977 (1978).

The United States Supreme Court rejected the state law, concluding that the Board unambiguously intended to preempt states from limiting the power of federal savings and loan associations to employ "due-on-sale" clauses. *Fidelity Federal*, 458 U.S. at 154. The fact that the Board did not mandate use of "due-on-sale"

clauses was, according to the Court, part of a conscious decision of the Board to afford associations the flexibility to accommodate special situations and circumstances and was not intended to allow states to limit the use of such clauses. *Id.* at 156.

> By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry the State has created "an obstacle to the accomplishment and execution of the full purposes and objectives" of the due-on-sale regulation.

Id.

To put matters simply, the Supreme Court found that the purpose of 12 C.F.R. § 556.9 is clear—to prohibit state limitations on federal savings and loan associations' use of "due-on-sale" clauses—and, therefore, a state law limiting such clauses defeats the purpose and objective of the Board's regulation.

The circumstances underlying *Fidelity Federal*, however, are dissimilar to the instant case. Initially, the history of the two is quite different. The Federal Home Loan Bank Board's decision to adopt a regulation pertaining to "due-on-sale" clauses was in response to certain states limiting the rights of federal savings and loan associations. Here, the impetus was the inadequacy of current state consumer remedies. No state had previously required warrantor participation in dispute resolution mechanisms; so, section 110 and Rule 703 were not, unlike the Board's rule in *Fidelity Federal*, adopted to preempt a particular state action. In addition, the Federal Home Loan Bank Board clearly expressed the policy that it was important that savings and loans have the "flexibility" given by the option of whether to have "due-on-sale" clauses in a particular loan instrument. No such congressional policy of "flexibility" exists in the adoption of the Magnuson-Moss Warranty Act. *Cf. Baird*

v. General Motors Corp., 654 F. Supp. 28 (N.D. Ohio 1986) (Congress, by enacting the National Traffic and Motor Vehicle Safety Act, *expressly found it necessary* to give automobile manufacturers an option to choose one of three occupant crash protection safety options in order to ensure that the automobile industry continues to develop such safety systems and, thereby, preempted a state from requiring only one of the federal options).

Since *Fidelity Federal* is distinguishable from this case and there is no frustration of either the broad goal of enhancing consumer protection or the specific goal of encouraging warrantor participation in informal dispute resolution mechanisms,[8] the Minnesota law requiring

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[8] Automobile Importers emphasize that another goal of the Magnuson-Moss Warranty Act is to enhance competition as Congress did in the cigarette industry. This Act, however, is unlike the Federal Cigarette Labeling and Advertising Act. The First Circuit found that Congress' expressed purpose in enacting the Federal Cigarette Labeling and Advertising Act—to inform the public of the hazards of cigarette smoking while protecting trade to the *maximum* extent—preempts state tort claims pertaining to failure to warn. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987) (the Act directed both the Department of Health and Human Services and the FTC to regulate compliance with the *expressed* dual goals of the Act). It is true that the Warranty Act attempts, in part, to provide consumers with better products at a lower price (including costs of repair) by enhancing competition, but Congress does so by increasing the market power of consumers and not the freedom of warrantors to do as they please to increase profits. Under the Act, consumers may receive increased warranty information. 15 U.S.C. §§ 2302 and 2304. That information has to be more accurate and understandable. 15 U.S.C. §§ 2302 and 2303. The promises in that information are more readily enforceable by the Act. 15 U.S.C. §§ 2304, 2308 and 2310. Additional remedies for consumers are provided. 15 U.S.C. § 2310. The Act attempts to break manufacturer lockstep and force manufacturers to enter into warranty competition. Requiring participation in an informal dispute resolution mechanism—while it may affect automobile manufacturers' profit margins—does not disturb the congressional goal of enhancing competition. *Cf. United States v. State of North Dakota*, 856 F.2d 1107 (8th Cir. 1988) ("Because Congress has

automobile manufacturers' participation in informal dispute resolution mechanisms is not preempted. *Cf. Chrysler Corp. v. Texas Motor Vehicles Comm'n.*, 755 F.2d at 1205-06 (a state-operated informal dispute resolution mechanism fails to directly conflict with federal law or to interfere with the attainment of the full purposes of and objectives of section 110 of the Magnuson-Moss Warranty Act).

2. Oral Presentation without the Consent of Both Parties

Congress and the FTC failed to provide a purpose for making oral presentations optional of both parties. It cannot be said that the Minnesota law permitting oral presentations at the option of the consumer frustrates the goals of enhancing consumer protection and encouraging warrantors to establish informal dispute resolution mechanisms because automobile manufacturers operating in Minnesota are required to establish such mechanisms. *Compare Motor Vehicle Manufacturers Ass'n. of the United States, Inc. v. Abrams*, slip op. at 23 (S.D. N.Y. Oct. 13, 1988);[9] *Chrysler Corp. v. Armstrong*, No. 83-45, slip op. at 1 (E.D. Ky. Apr. 30, 1985).

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mandated that the military procure liquor on a competitive basis in order to maximize profits for the support of welfare and morale activities," a state law raising the costs of procurement of liquor conflicts with federal policy and is, thereby, preempted).

[9] In *Motor Vehicle Manufacturers*, the United States District Court for the Southern District of New York held that a New York law permitting oral presentations at the option of the consumer was preempted because giving this option to consumers would deter automobile manufacturers from establishing dispute mechanisms. This problem is not present under the Minnesota scheme because participation is mandatory. The *Motor Vehicle Manufacturers* court held, in addition, that the New York rule of giving the option to the consumer thwarts the "federal purpose of fostering national mechanisms." Slip op. at 26. We find, however, that there is no

3. Consumer Fees

Minn. Stat. § 325F.665, subd. 6(i) provides that a consumer may be charged a fee for participating in a dispute mechanism, while 16 C.F.R. § 703.3(a) provides that a consumer shall not be charged any fee for use of such mechanisms. Since the maximum fee that can be charged to a consumer is equal to the filing fee for use of conciliation court—in Hennepin County, $15.00, and in St. Louis County, $18.00—the effect of this requirement on the use of resolution mechanisms by consumers, *see* H.R. Rep. No. 1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7722, is *de minimis* and not sufficient to deter consumers from using such mechanisms. Therefore, this fee aspect of the Minnesota law is not preempted.

IV. CONCLUSION

By enacting the Magnuson-Moss Warranty Act, Congress has increased the economic strength of consumers without fully occupying the area of consumer protection, an area traditionally reserved for the states. Congress intended state regulation, like the Minnesota lemon law, to operate with the Warranty Act in a mutually supplementary manner. The Minnesota law does nothing to defeat this result. For these reasons, we affirm the district court.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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legislative history to support the establishment of such a purpose. *But see Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987). The statements of the FTC, pointed to in *Motor Vehicle Manufacturers* as support for the existence of such a purpose, are far from significant—particularly in light of the FTC Staff Opinion Letter advising Kentucky's Attorney General that state provisions permitting oral presentations at the option of the consumer do not conflict with federal law. *See, supra,* n.7; *see also Motor Vehicle Manufacturers,* at 16-17.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-87-683

AUTOMOBILE IMPORTERS OF AMERICA, INC.; ALFA ROMEO, INC.; AMERICAN ISUZU MOTORS, INC.; BMW OF NORTH AMERICA, INC.; HYUNDAI MOTOR CO. AMERICA; JAGUAR CARS, INC.; MAZDA MOTORS OF AMERICA (CENTRAL), INC.; MITSUBISHI MOTOR SALES OF AMERICA, INC.; NISSAN MOTOR CORPORATION IN U.S.A.; PEUGEOT MOTORS OF AMERICA, INC.; PORSCHE CARS OF NORTH AMERICA, INC.; ROLLS ROYCE MOTORS, INC.; SAAB-SCANIA OF AMERICA, INC.; SUZUKI OF AMERICA AUTOMOTIVE CORPORATION; VOLVO OF NORTH AMERICA; and YUGO OF AMERICA, INC.,

Plaintiffs,

vs.

STATE OF MINNESOTA AND THE ATTORNEY GENERAL FOR THE STATE OF MINNESOTA,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Automobile Importers of America, Inc., a not-for-profit District of Columbia corporation, and fifteen of its members, all importers of automobiles sold in Minnesota, brought this action against the State of Minnesota and the Attorney General of the State of Minnesota. Plaintiffs challenge amendments made in 1987 to the Minnesota "lemon law," Minn. Stat. § 325F.665. The amendments require auto manufacturers to provide an informal dispute settlement mechanism in the State of Minnesota to deal with warranty disputes. Count 1 of

plaintiffs' first amended complaint alleges that several provisions of the state statute are preempted by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Magnuson-Moss or the Act), 15 U.S.C. §§ 2301-2312, and regulations promulgated under Magnuson-Moss by the Federal Trade Commission, 16 C.F.R. §§ 703.1-703.8 (1987). Count 2 asserts that the state statute effects a government taking of private property without due process and just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the Minnesota Constitution.[1] Jurisdiction is alleged under 28 U.S.C. § 1331 and pendent jurisdiction.

Plaintiffs seek a declaration, pursuant to 28 U.S.C. §§ 2201 and 2202, that the Minnesota lemon law is invalid and unenforceable. They also request an injunction enjoining the enforcement or implementation of the provision.

Plaintiffs filed their original complaint on July 29, 1987, three days prior to the scheduled effective date of the amendments. On July 31, 1987, the Honorable David S. Doty denied plaintiffs' motion for a temporary restraining order that would have enjoined enforcement of the amendments. Agreeing that no disputed issues of material fact remain, each side now moves for summary judgment.

Background

A. *The Magnuson-Moss Act*

In enacting Magnuson-Moss in 1975, Congress sought to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C.

[1] Plaintiffs' original complaint included a number of other constitutional and statutory claims that have not been asserted in the first amended complaint.

§ 2302(a). To this end, the Act directs the Federal Trade Commission (FTC) to establish rules requiring warranties to be written in simple and understandable language. *Id.* Congress also declared it to be its policy "to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1). The Act thus permits, but does not require, warrantors to establish informal dispute settlement mechanisms. It directs the FTC to establish "rules setting forth minimum requirements" for such mechanisms. 15 U.S.C. § 2310(a)(2). Under these regulations, consumers cannot be charged a fee for use of the mechanism, 16 C.F.R. § 703.3(a) (1987), and neither party has a right to make an oral presentation unless the other agrees, 16 C.F.R. § 703.5(f) (1987). The regulations also set forth many other requirements for informal dispute mechanisms. *See generally* 16 C.F.R. § 703 ("Rule 703").

The Act includes a number of provisions concerning its relationship with state laws:

> (b) Rights, remedies, and liabilities
>
> (1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.
>
> (2) Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.
>
> (c) State warranty laws
>
> (1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder).

shall not be applicable to written warranties complying with such sections (or rules thereunder).

15 U.S.C. § 2311. Subsection (b) is commonly referred to as a "savings clause" and subsection (c) is referred to as a "preemption clause."

B. *The Minnesota Lemon Law*

Minnesota enacted its "lemon law" in 1983 in order to provide protections for the owners of new motor vehicles. Minn. Stat. § 325F.665. The law establishes a duty of manufacturers to repair new cars to conform to the written warranty for up to a period of two years, *id.* at subd. 2, and allows car owners to bring an action in state court to seek a refund, *id.* at subd. 9. The manufacturer may require a consumer to participate in an informal dispute settlement mechanism before bringing an action in state court. *Id.* at subd. 6(a). The results of the mechanism are nonbinding, unless otherwise agreed upon by the parties. *Id.* at subd. 7.[2]

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[2] At the present time, four arbitration mechanisms consider claims of Minnesota consumers. These are the Better Business Bureau Autoline Program, the Chrysler Corporation Customer Satisfaction Arbitration Board, the Ford Motor Company Consumer Appeals Board, and the American Automobile Association program. The Better Business Bureau Autoline Program handles

In 1987, the Minnesota legislature amended the lemon law statute. Plaintiffs challenge three aspects of those amendments that differ from federal law. First, the lemon law, as amended, provides that auto manufacturers "shall operate, or participate in, an informal dispute settlement mechanism located in the state of Minnesota which complies with the provisions of the Code of Federal Regulations, title 16, part 703, and the requirements of this section." Minn. Stat. § 325F.665 subd. 6(a). The lemon law thus requires manufacturers to provide such a mechanism while Magnuson-Moss permits, but does not require, such mechanisms. Second, under the lemon law, the mechanism "shall allow each party to appear and make an oral presentation in the state of Minnesota." *Id.* at subd. 6(e). By contrast, Rule 703 allows such presentations only when the opposing party consents. Finally, the lemon law provides that "[a] consumer may be charged a fee to participate in an informal dispute settlement mechanism required by this section, but the fee may not exceed the conciliation court filing fee in the county where the arbitration is conducted." *Id.* at subd. 6(i). Rule 703 provides that consumers may not be charged a fee for participation in a mechanism.[3]

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arbitrations for a number of manufacturers, including some of the plaintiff manufacturers. Other plaintiff manufacturers have elected to negotiate directly with consumers and litigate the claims in state court if necessary. *See* Affidavit of Robert John Marcroft para. 2.

[3] Numerous other states have lemon laws of some type. Four other states also require manufacturers to participate in arbitration programs. Connecticut, Massachusetts, and Texas operate the programs themselves. Kentucky, like Minnesota, requires manufacturers to participate in a privately operated program, and allows consumers to make an oral presentation if requested. Unlike Minnesota, however, Kentucky does not require programs to comply with Rule 703. *See* Affidavit of Robert John Marcroft paragraphs 3-7.

Discussion

A. *Count One—Preemption*

Plaintiffs argue that the disputed 1987 amendments to the lemon law are preempted by Magnuson-Moss and Rule 703. Preemption of state law by federal law is "not to be lightly presumed." *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 689 (1987). Nevertheless, it may occur in three ways. First, Congress may explicitly indicate that it intends to preempt state law. Second, implied preemption may be inferred "when the federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.'" *International Paper Co. v. Ouellette*, 107 S. Ct. 805, 811 (1987) (citations omitted). Finally, if Congress has not completely displaced state regulation in a specific area, state law may still be preempted to the extent that it

> actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta, 458 U.S. 141, 153 (1982); *see also California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 689 (1987) (describing three means of preemption); *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (same). Apparently conceding that no explicit indication of preemption exists, plaintiffs assert that the lemon law provisions are preempted under the second and third standards.

Plaintiffs first argue that Magnuson-Moss and the FTC regulation established a comprehensive procedural

framework that leaves no room for state regulation. On this point, they rely heavily upon *Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987). In *Wolf*, a consumer challenged the Ford Consumer Appeals Board (FCAB) through a state common law fraud action, arguing that Ford had fradulently represented that the FCAB was an independent and impartial apparatus for resolving disputes. After examining the federal regulatory scheme, the Fourth Circuit found that "Congress' intent to preempt state regulation . . . can be inferred both from the pervasive nature of the federal regulatory scheme and from the conflict that would result if Wolf's fraud claim were allowed." *Id.* at 1279. Concluding that the FTC regulations "leave no room for state regulation," *id.*, the court found that the state law fraud claim was preempted by federal law.

Both sides find support for their positions in *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985), in which the court considered a preemption challenge to the state-run mechanism established by the Texas lemon law. The Fifth Circuit noted that "[c]onsumer protection through warranty law is an area that has traditionally been regulated by states," and found no congressional intent "to occupy the field of informal settlement mechanisms for warranty disputes." *Id.* at 1205-06. The court also relied upon the savings clause in Magnuson-Moss and rejected Chrysler's argument that the clause refers only to substantive rights and remedies and not to state-authorized procedures. *Id.* at 1206. The court concluded by stating:

> We think it plain that the preclusive effect of section 110 is limited to rules governing informal dispute resolution procedures created by private warrantors and does not affect such schemes where provided as an option for consumers by state law.

Id. Defendants assert that *Chrysler Corp.* establishes that the Minnesota lemon law is not preempted. Plain-

tiffs, on the other hand, argue that the case's holding applies only to state-run mechanisms and contend that the court found preemptive effect on procedures created by private warrantors, such as that established by the Minnesota lemon law.

The court finds that plaintiffs have not shown that federal law leaves no room for state regulation in this area. *Wolf* is distinguishable from the situation now before the court. The plaintiff in *Wolf* challenged the FCAB through a state common law fraud action; the action did not involve a state lemon law statute. The Fourth Circuit understandably concluded that "allowing consumers to challenge the operation of dispute settlement boards through state fraud actions would conflict with enforcement of the FTC regulations." 829 F.2d at 1280. The matter before this court, by contrast, concerns the power of a state legislature to attempt to enhance protections accorded consumers by federal law. *Chrysler Corp.* is more on point insofar as it considered a preemption challenge to a state lemon law. The Fifth Circuit found no congressional intent "to occupy the field of informal settlement mechanisms." 755 F.2d at 1206.[4]

The *Chrysler Corp.* court also relied upon the savings clause in Magnuson-Moss, which provides that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." 15 U.S.C. § 2311(b)(1). Moreover, the preemption clause specifically limits its effect to state laws related to labeling and disclosure in warranties, 15 U.S.C. § 2311(c), and could have included informal dispute settlement procedures had Congress so intended. In *Chrysler Corp. v. Armstrong*, No. 83-45, slip op. at 1 (E.D. Ky. Apr. 30, 1985), the court interpreted the sav-

[4] If the court were to accept the distinction between state-run programs and state-regulated manufacturer mechanisms as urged by plaintiffs, then the Fifth Circuit's statement concerning "procedures created by private warrantors" is dictum.

ings and preemption clauses and found an oral hearing requirement for informal dispute resolution mechanisms not to be preempted by Magnuson-Moss. The court found itself in agreement with a nonbinding FTC staff opinion on the issue which determined that the oral hearing requirement was not explicitly or implicitly preempted.[5]

Plaintiffs contend that the savings clause in Magnuson-Moss does not protect the Minnesota lemon law from preemption in the face of congressional intent to preempt. First, plaintiffs note that no state had enacted a lemon law at the time Magnuson-Moss was passed, thus indicating that Congress could not have had such laws in mind when it drafted the savings clause. Plaintiffs also claim that the savings clause acts to preserve state legislation with respect to other substantive rights and remedies but not with respect to the procedural requirements for informal dispute resolution mechanisms. Finally, plaintiffs contend that the Supreme Court has repeatedly held that a general savings clause cannot protect otherwise preempted state law. *See, e.g., International Paper Co. v. Ouellette*, 107 S. Ct. 805, 812 (1987) ("[W]e do not believe Congress intended to undermine this carefully drawn statute through a general savings clause . . . .").

Although the existence of a savings clause may not preclude preemption where other indications of intent to preempt exist, plaintiffs have failed to make such a show-

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[5] The FTC staff opinion stated:

> Magnuson-Moss makes it clear that the preservation of consumer rights and remedies under state law is paramount: it not only sets no limitation on the savings clause for state-created rights and remedies, but it expressly subordinates the preemption provision to the savings clause. Also, the legislative history of the federal law shows that Congress anticipated additional state legislation even in areas where Congress had acted.

P. 4 (footnote omitted).

ing. The savings clause and the narrow preemption clause do indicate some congressional intent to preserve state law.[6] Moreover, the Fifth Circuit has explicitly rejected plaintiffs' attempted distinction between substantive rights and remedies and procedural requirements. *Chrysler Corp.*, 755 F.2d at 1206. Plaintiffs have failed to establish federal preemption under the second standard.

Plaintiffs next assert that the Minnesota lemon law is preempted under the third standard. They claim that it is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[7] In plaintiffs' view, one of the central purposes of Magnuson-Moss was to promote the voluntary development of settlement mechanisms and marketplace competition between varying warranty pro

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[6] The FTC has interpreted the savings and preemption clauses as follows:

> In general, the protections of the Warranty Act are in addition to, rather than in lieu of, warranty rights and remedies under State law. Only a very narrow class of State requirements are "preempted" . . . . [W]hile allowing the use of uniform warranty documents is a goal of [the preemption clause], this goal is subordinate to that of permitting States to fashion their own scheme o[f] warranty rights and remedies which may be more protective than the minimum level of protection of the Federal Act. . . . Thus, a State provision which merely creates consumer rights or remedies, without providing for disclosure of them, would be entirely unaffected by the Warranty Act; that is, it would not be subject to "preemption."

43 Fed. Reg. 50,737-38 (Oct. 31, 1978) (footnotes omitted).

[7] With less emphasis, plaintiffs also assert that the lemon law is preempted because "compliance with both federal and state regulations is a physical impossibility." On this point, plaintiffs note that FTC regulations forbid manufacturers to impose a fee on consumers for use of a dispute resolution mechanism, while the lemon law allows the imposition of a fee. By exercising their right under Minnesota law to charge a fee, plaintiffs claim that they would be in violation of federal law. As noted by Judge Doty, however, plaintiffs could comply with both by electing not to impose a fee. Slip op. at 6.

cedures. Plaintiffs stress that Congress declared it to be its policy to "encourage" warrantors to develop settlement mechanisms. 15 U.S.C. § 2310(a)(1). By requiring manufacturers to provide such mechanisms, the lemon law, according to plaintiffs, frustrates the congressional purpose of encouraging their voluntary development. Moreover, plaintiffs claim that the lemon law violates the balance established by Congress between the rights of manufacturers and consumers in its effort to accommodate the interests of both groups. Finally, plaintiffs argue that the lemon law interferes with the methods selected by Congress, noting that Rule 703 makes oral hearings optional.

Plaintiffs place considerable reliance upon *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), in arguing that a state statute may not eliminate an option granted under federal law. In *Fidelity*, the Supreme Court considered the preemptive effect of a federal regulation that granted federal savings and loan associations the right to use "due-on-sale" clauses in their mortgage contracts. Such clauses had been held to be forbidden under California law, and a federal savings and loan association argued that California law was preempted by the federal regulation. The Court agreed, finding that an actual conflict existed between federal and state law. *Id.* at 159. In plaintiffs' view, *Fidelity* requires a finding that Magnuson-Moss and Rule 703 preempt the Minnesota lemon law.

Plaintiffs' reliance on *Fidelity* is misplaced, however. *Fidelity* involved a situation where federal law gave entities an option to include such clauses while state law prohibited them from doing so. Magnuson-Moss gives manufacturers the option to establish informal dispute settlement mechanisms. The lemon law does not prohibit manufacturers from establishing such mechanisms, as was the case in *Fidelity*, but rather requires them to

do so. *Fidelity* therefore does not require a finding that the lemon law is in actual conflict with federal law.[8]

Plaintiffs' reliance on *Fidelity* is plausible only if Magnuson-Moss is interpreted as granting to manufacturers an affirmative right *not* to offer settlement mechanisms. Although the legislative history suggests some concern with fairness to manufacturers, the overriding intent behind Magnuson-Moss appears to have been to enhance consumer protections. The legislative history reflects a perception on the part of Congress that consumers were inadequately protected.[9] Plaintiffs' conten-

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[8] *Fidelity* also involved a clear indication by the agency that its regulation was intended to preempt state law. The Court noted:

> In the preamble accompanying final publication of the due-on-sale regulation, the Board explained its intent that the due-on-sale practices of federal savings and loans be governed "exclusively by Federal law." 41 Fed. Reg. 18286, 18287 (1976). The Board emphasized that "[f]ederal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements." *Ibid.*

458 U.S. at 147 (footnote omitted).

[9] The House Report accompanying the Act noted:

> Paralleling the growth of acquisition of consumer products has been a growing concern of the American consumer with the quality and durability of many of those products. Another growing source of resentment has been the inability to get many of those products properly repaired and the developing awareness that the paper with the filigree border bearing the bold caption "Warranty" or "Guarantee" was often of no greater worth than the paper it was printed on. Indeed, in many cases where a warranty or guarantee was ostensibly given the old saying applied "The bold print giveth and the fine print taketh away." For the paper operated to take away from the consumer the ~~im~~plied warranties of merchantability and fitness arising by operation of law leaving little in its stead.

H.R. Rep. No. 1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7702, 7706. *See also Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1061 (5th Cir. 1984) (" 'The draftsmen [of Magnuson-Moss] believed that warranties on consumer products

tion that a significant congressional purpose behind Magnuson-Moss was to convey rights to manufacturers is unsupported.[10]

The Minnesota lemon law does not stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." On the contrary, Minnesota seeks to further the congressional goal of protecting consumers by enhancing the protections established by Magnuson-Moss. Indeed, there is some suggestion that Congress envisioned such enhancements insofar as it directed the FTC to "prescribe rules setting forth *minimum requirements* for any informal dispute settlement procedure . . . ." 15 U.S.C. § 2310(a)(2) (emphasis added).[11] The lemon law therefore is not preempted under the third standard.

Plaintiffs have failed to show that the Minnesota lemon law is preempted under any of the three tests established by the Supreme Court. Defendants' motion for summary judgment on count 1 should therefore be granted, and plaintiffs' motion for summary judgment on that count should be denied.

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often were too complex to be understood, too varied for consumers to make intelligent market comparisons, and too restrictive for meaningful warranty protection.'") (quoting Schroeder, *Private Actions under the Magnuson-Moss Warranty Act*, 66 Calif. L. Rev. 1, 2 (1978)).

[10] As such, this case is distinguishable from *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 471 (1984), a case relied upon by plaintiffs, in which the Supreme Court found that "the question of the producer's free choice was a central focus of congressional attention during the passage of the Act."

[11] Plaintiffs contend that this language only suggests that manufacturers may voluntarily decide to establish additional requirements. In any event, the language indicates that Congress did not view the FTC regulations as exclusively governing such mechanisms.

B. *Count Two—Taking*

Plaintiffs also allege that the Minnesota lemon law "effects a governmental taking of private property without due process and without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Art. I, § 7 and Art. I, § 13 of the Minnesota Constitution." First Amended Complaint para. 21. By requiring manufacturers to expend their own funds to make informal dispute mechanisms avaliable to consumers, the Minnesota lemon law allegedly effects an unconstitutional taking. Plaintiffs claim that the lemon law constitutes the "compulsory privatization of [the] distinctly public function [of] dispute resolution." Plaintiffs' Brief at 29. That the taking involves financial resources rather than real property is immaterial, according to plaintiffs. In this regard, plaintiffs rely upon *Midkiff v. Tom*, 471 F. Supp. 871, 884 (D. Hawaii 1979), which stated that requiring lessors to pay one-half of arbitration costs "may be a taking of property without just compensation."

Defendants respond that with the exception of *Midkiff*, all of the cases cited by plaintiffs concern real property rather than financial resources. With respect to *Midkiff*, defendants assert that the relied upon statement is dictum. In defendants' view, government regulation often imposes financial losses. They rely upon *Andrus v. Allard*, 444 U.S. 51 (1979), in which the Supreme Court stated:

> [G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*.

Id. at 65 (emphasis in original). The *Andrus* Court concluded:

> It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden

> borne to secure "the advantage of living and doing business in a civilized community." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).

Id. at 67. Finally, defendants assert that any economic deprivation is likely to be minimal, relying upon evidence that arbitrations are relatively inexpensive and rarely required under informal dispute settlement mechanisms.

Although the parties have addressed the merits of plaintiffs' taking claim, the court finds that "it would be premature to consider this contention on the present record." *Pennell v. City of San Jose*, 108 S. Ct. 849, 856 (1988). The Supreme Court's recent decision in *Pennell* stressed that it is "particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.'" *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-95 (1981)). Nothing in the record before the court indicates that an actual consumer complaint brought to an informal dispute resolution mechanism has imposed financial costs on plaintiffs under the new law. The consequences of the law need to be shown by specific facts. There is presently not "a sufficiently concrete factual setting for the adjudication of the takings claim [plaintiffs] raise . . . ." *Id.* at 857. Platintiffs' taking claim is premature and should therefore be dismissed without prejudice.

Accordingly, pursuant to the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. The motion of defendants for summary judgment is granted with respect to count 1, and that claim is dismissed with prejudice. Count 2 is dismissed without prejudice.

2. The motion of plaintiffs for summary judgment is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 25, 1988

/s/ Diana E. Murphy
DIANA E. MURPHY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-5131

AUTOMOBILE IMPORTERS OF AMERICA, INC.; ALFA ROMEO, INC.; AMERICAN ISUZU MOTORS, INC.; BMW OF NORTH AMERICA, INC.; HYUNDAI MOTOR CO. AMERICA; JAGUAR CARS, INC.; MAZDA MOTORS OF AMERICA (CENTRAL), INC.; MITSUBISHI MOTOR SALES OF AMERICA, INC.; NISSAN MOTOR CORPORATION IN U.S.A.; PEUGEOT MOTORS OF AMERICA, INC.; PORSCHE CARS OF NORTH AMERICA, INC.; ROLLS ROYCE MOTORS, INC.; SAAB-SCANIA OF AMERICA, INC.; SUZUKI OF AMERICA AUTOMOTIVE CORPORATION; VOLVO OF NORTH AMERICA CORPORATION; and YUGO OF AMERICA, INC.

Appellants,

v.

STATE OF MINNESOTA AND THE ATTORNEY GENERAL FOR THE STATE OF MINNESOTA,

Appellees.

CHRYSLER CORPORATION,

Amicus/Appellant

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

March 17, 1989

A True Copy:
ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

Title I, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, P.L. 93-637

15 U.S.C. § 2301. Definitions

For the purposes of this chapter:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term "written warranty" means—

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term "remedy" means whichever of the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A)

(15) The Term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "State law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the

United States; and the term "Federal law" excludes any State law.

(Pub. L. 93-637, Title I, § 101, Jan. 4, 1975, 88 Stat. 2183.)

§ 2302. Rules governing contents of warranties

(a) In order to improve the adequacy of information available to consumers, prevent deception, and impose competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense —and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b)(1)(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this chapter (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

(c) No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if—

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest.

The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

(d) The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $5.

(Pub.L. 93-637, Title I, § 102, Jan. 4, 1975, 88 Stat. 2185.)

§ 2303. Designation of written warranties

(a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "full (statement of duration) warranty".

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "limited warranty".

(b) This section and sections 2302 and 2304 of this title shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

(c) In addition to exercising the authority pertaining to disclosure granted in section 2302 of this title, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than

$10 and which are not designated "full (statement of duration) warranties".

(Pub.L. 93-637, Title I, § 103, Jan. 4, 1975, 88 Stat. 2187.)

§ 2304. Federal minimum standards for warranties

(a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

(b)(1) In fulfilling the dutites under subsection (a) of this section respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warrant, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a) of this section, that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule define in detail the duties set forth in subsection (a) of this section and the applicability of such duties to warrantors of different categories of consumer products with "full (statement of duration)" warranties.

(4) The duties under subsection (a) of this section extend from the warrantor to each person who is a consumer with respect to the consumer product.

(c) The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) For purposes of this section and of section 2302(c) of this title, the term "without charge" means that the

warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) of this section to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty on such a product shall, for purposes of any action under section 2310(d) of this title or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

(Pub.L. 93-637, Title I, § 104, Jan. 4, 1975, 88 Stat. 2187).

§ 2305. Full and limited warranting of a consumer product

Nothing in this chapter shall prohibit the selling of a consumer product which has both full and limited warranties if such warranties are clearly and conspicuously differentiated.

(Pub.L. 93-637, Title I, § 105, Jan. 4, 1975, 88 Stat. 2188)

§ 2306. Service contracts; rules for full, clear and conspicuous disclosure of terms and conditions; addition to or in lieu of written warranty

(a) The Commission may prescribe by rule the manner and form in which the terms and conditions of serv-

ice contracts shall be fully, clearly, and conspicuously disclosed.

(b) Nothing in this chapter shall be construed to prevent a supplier or warrantor from entering into a service contract with the consumer in addition to or in lieu of a written warranty if such contract fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language.

(Pub.L. 93-637, Title I, § 106, Jan. 4, 1975, 88 Stat. 2188.)

§ 2307. Designation of representatives by warrantor to perform duties under written or implied warranty

Nothing in this chapter shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *Provided*, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

(Pub.L. 93-637, Title I, § 107, Jan. 4, 1975, 88 Stat. 2189.)

§ 2308. Implied warranties

(a) No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be

limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

(Pub.L. 93-637, Title I, § 108, Jan. 4, 1975, 88 Stat. 2189.)

§ 2309. Procedures applicable to promulgation of rules by Commission; rulemaking proceeding for warranty and warranty practices involved in sale of used motor vehicles

(a) Any rule prescribed under this chapter shall be prescribed in accordance with section 553 of Title 5; except that the Commission shall give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions. A transcript shall be kept of any oral presentation. Any such rule shall be subject to judicial review under section 57a (e) of this title in the same manner as rules prescribed under section 57a(a)(1)(B) of this title, except that section 57a(e)(3)(B) of this title shall not apply.

(b) The Commission shall initiate within one year after January 4, 1975, a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this chapter, shall prescribe rules dealing with such warranties and practices. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this chapter, or other law, and in addition it may require disclosure that a used

motor vehicle is sold without any warranty and specify the form and content of such disclosure.

(Pub.L. 93-637, Title I, § 109, Jan. 4, 1975, 88 Stat. 2189.)

§ 2310. Remedies in consumer disputes

(a) (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If—

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty.

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) of this section except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless

the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).

(c)(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission

by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty, which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d)(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) No action (other than a class action or an action respecting a warranty to which subsection (a)(3) of this section applies) may be brought under subsection (d) of

this section for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) of this section applies) brought under subsection (d) of this section for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

(Pub.L. 93-637, Title I, § 110, Jan. 4, 1975, 88 Stat. 2189.)

§ 2311. Applicability to other laws

(a)(1) Nothing contained in this chapter shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act or any statute defined therein as an Antitrust Act.

(2) Nothing in this chapter shall be construed to repeal, invalidate, or supersede the Federal Seed Act and nothing in this chapter shall apply to seed for planting.

(b) (1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c) (1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies (A) affords protection to consumers greater than the requirements of this chapter and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

(d) This chapter (other than section 2302(c) of this title) shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this chapter.

(Pub.L. 93-637, Title I, § 111, Jan. 4, 1975, 88 Stat. 2192.)

§ 2312. Effective dates.

(a) Except as provided in subsection (b) of this section, this chapter shall take effect 6 months after January 4, 1975, but shall not apply to consumer products manufactured prior to such date.

(b) Section 2302(a) of this title shall take effect 6 months after the final publication of rules respecting such section; except that the Commission, for good cause shown, may postpone the applicability of such sections until one year after such final publication in order to permit any designated classes of suppliers to bring their written warranties into compliance with rules promulgated pursuant to this chapter.

(c) The Commission shall promulgate rules for initial implementation of this chapter as soon as possible after January 4, 1975, but in no event later than one year after such date.

(Pub.L. 93-637, Title I, § 112, Jan. 4, 1975, 88 Stat. 2192.)

Federal Trade Commission—
Informal Dispute Settlement Procedures

16 C.F.R. § 703.1 Definitions.

(a) "The Act" means the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301, *et seq.*

(b) "Consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(c) "Written warranty" means:

(1) Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(2) Any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(d) "Warrantor" means any person who gives or offers to give a written warranty which incorporates an informal dispute settlement mechanism.

(e) "Mechanism" means an informal dispute settlement procedure which is incorporated into the terms of

a written warranty to which any provision of Title I of the Act applies, as provided in section 110 of the Act.

(f) "Members" means the person or persons within a Mechanisms actually deciding disputes.

(g) "Consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of a written warranty applicable to the product, and any other person who is entitled by the terms of such warranty or under applicable state law to enforce against the warrantor the obligations of the warranty.

(h) "On the face of the warranty" means:

(1) If the warranty is a single sheet with printing on both sides of the sheet, or if the warranty is comprised of more than one sheet, the page on which the warranty text begins;

(2) If the warranty is included as part of a longer document, such as a use and care manual, the page in such document on which the warranty text begins.

§ 703.2 Duties of warrantor.

(a) The warrantor shall not incorporate into the terms of a written warranty a Mechanism that fails to comply with the requirements contained in §§ 703.3 through 703.8 of this part. This paragraph shall not prohibit a warrantor from incorporating into the terms of a written warranty the step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty as described in section 102(a)(7) of the Act and required by Part 701 of this subchapter.

(b) The warrantor shall disclose clearly and conspicuously at least the following information on the face of the written warranty:

(1) A statement of the availability of the informal dispute settlement mechanism;

(2) The name and address of the Mechanism, or the name and a telephone number of the Mechanism which consumers may use without charge;

(3) A statement of any requirement that the consumer resort to the Mechanism before exercising rights or seeking remedies created by Title I of the Act; together with the disclosure that if a consumer chooses to seek redress by pursuing rights and remedies not created by Title I of the Act, resort to the Mechanism would not be required by any provision of the Act; and

(4) A statement, if applicable, indicating where further information on the Mechanism can be found in materials accompanying the product, as provided in § 703.2 (c) of this section.

(c) The warrantor shall include in the written warranty or in a separate section of materials accompanying the product, the following information:

(1) Either (i) a form addressed to the Mechanism containing spaces requesting the information which the Mechanism may require for prompt resolution of warranty disputes; or (ii) a telephone number of the Mechanism which consumers may use without charge;

(2) The name and address of the Mechanism;

(3) A brief description of Mechanism procedures;

(4) The time limits adhered to by the Mechanism; and

(5) The types of information which the Mechanism may require for prompt resolution of warranty disputes.

(d) The warrantor shall take steps reasonably calculated to make consumers aware of the Mechanism's existence at the time consumers experience warranty disputes. Nothing contained in paragraphs (b), (c), or (d)

of this section shall limit the warrantor's option to encourage consumers to seek redress directly from the warrantor as long as the warrantor does not expressly require consumers to seek redress directly from the warrantor. The warrantor shall proceed fairly and expeditiously to attempt to resolve all disputes submitted directly to the warrantor.

(e) Whenever a dispute is submitted directly to the warrantor, the warrantor shall, within a reasonable time, decide whether, and to what extent, it will satisfy the consumer, and inform the consumer of its decision. In its notification to the consumer of its decision, the warrantor shall include the information required in § 703.2 (b) and (c) of this section.

(f) The warrantor shall: (1) Respond fully and promptly to reasonable requests by the Mechanism for information relating to disputes;

(2) Upon notification of any decision of the Mechanism that would require action on the part of the warrantor, immediately notify the Mechanism whether, and to what extent, warrantor will abide by the decision; and

(3) Perform any obligations it has agreed to.

(g) The warrantor shall act in good faith in determining whether, and to what extent, it will abide by a Mechanism decision.

(h) The warrantor shall comply with any reasonable requirements imposed by the Mechanism to fairly and expeditiously resolve warranty disputes.

Minimum Requirements of the Mechanism

§ 703.3 Mechanism organization.

(a) The Mechanism shall be funded and competently staffed at a level sufficient to ensure fair and expeditious resolution of all disputes, and shall not charge consumers any fee for use of the Mechanism.

(b) The warrantor and the sponsor of the Mechanism (if other than the warrantor) shall take all steps necessary to ensure that the Mechanism, and its members and staff, are sufficiently insulated from the warrantor and the sponsor, so that the decisions of the members and the performance of the staff are not influenced by either the warrantor or the sponsor. Necessary steps shall include, at a minimum, committing funds in advance, basing personnel decisions solely on merit, and not assigning conflicting warrantor or sponsor duties to Mechanism staff persons.

(c) The Mechanism shall impose any other reasonable requirements necessary to ensure that the members and staff act fairly and expeditiously in each dispute.

§ 703.4 Qualification of members.

(a) No member deciding a dispute shall be: (1) A party to the dispute, or an employee or agent of a party other than for purposes of deciding disputes; or

(2) A person who is or may become a party in any legal action, including but not limited to class actions, relating to the product or complaint in dispute, or an employee or agent of such person other than for purposes of deciding disputes. For purposes of this paragraph (a) a person shall not be considered a "party" solely because he or she acquires or owns an interest in a party solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment.

(b) When one or two members are deciding a dispute, all shall be persons having no direct involvement in the manufacture, distribution, sale or service of any product. When three or more members are deciding a dispute, at least two-thirds shall be persons having no direct involvement in the manufacture, distribution, sale or serv-

ice of any product. "Direct involvement" shall not include acquiring or owning an interest solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment. Nothing contained in this section shall prevent the members from consulting with any persons knowledgeable in the technical, commercial or other areas relating to the product which is the subject of the dispute.

(c) Members shall be persons interested in the fair and expeditious settlement of consumer disputes.

§ 703.5 Operation of the Mechanism.

(a) The Mechanism shall establish written operating procedures which shall include at least those items specified in paragraphs (b) through (j) of this section. Copies of the written procedures shall be made available to any person upon request.

(b) Upon notification of a dispute, the Mechanism shall immediately inform both the warrantor and the consumer of receipt of the dispute.

(c) The Mechanism shall investigate, gather and organize all information necessary for a fair and expeditious decision in each dispute. When any evidence gathered by or submitted to the Mechanism raises issues relating to the number of repair attempts, the length of repair periods, the possibility of unreasonable use of the product, or any other issues relevant in light of Title I of the Act (or rules thereunder), including issues relating to consequential damages, or any other remedy under the Act (or rules thereunder), the Mechanism shall investigate these issues. When information which will or may be used in the decision, submitted by one party, or a consultant under § 703.4(b) of this part, or any other source tends to contradict facts submitted by the other party, the Mechanism shall clearly, accurately,

and completely disclose to both parties the contradictory information (and its source) and shall provide both parties an opportunity to explain or rebut the information and to submit additional materials. The Mechanism shall not require any information not reasonably necessary to decide the dispute.

(d) If the dispute has not been settled, the Mechanism shall, as expeditiously as possibly but at least within 40 days of notification of the dispute, except as provided in paragraph (e) of this section:

(1) Render a fair decision based on the information gathered as described in paragraph (c) of this section, and on any information submitted at an oral presentation which conforms to the requirements of paragraph (f) of this section (A decision shall include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedies available under the written warranty or the Act (or rules thereunder); and a decision shall state a specified reasonable time for performance);

(2) Disclose to the warrantor its decision and the reasons therefor;

(3) If the decision would require action on the part of the warrantor, determine whether, and to what extent, warrantor will abide by its decision; and

(4) Disclose to the consumer its decision, the reasons therefor, warrantor's intended actions (if the decision would require action on the part of the warrantor), and the information described in paragrph (g) of this section. For purposes of paragraph (d) of this section a dispute shall be deemed settled when the Mechanism has ascertained from the consumer that:

(i) The dispute has been settled to the consumer's satisfaction; and (ii) the settlement contains a specified reasonable time for performance.

(e) The Mechanism may delay the performance of its duties under paragraph (d) of this section beyond the 40 day time limit:

(1) Where the period of delay is due solely to failure of a consumer to provide promptly his or her name and address, brand name and model number of the product involved, and a statement as to the nature of the defect or other complaint; or

(2) For a 7 day period in those cases where the consumer has made no attempt to seek redress directly from the warrantor.

(f) The Mechanism may allow an oral presentation by a party to a dispute (or a party's representative) only if: (1) both warrantor and consumer expressly agree to the presentation;

(2) Prior to agreement the Mechanism fully discloses to the consumer the following information:

(i) That the presentation by either party will take place only if both parties so agree, but that if they agree, and one party fails to appear at the agreed upon time and place, the presentation by the other party may still be allowed;

(ii) That the members will decide the dispute whether or not an oral presentation is made;

(iii) The proposed date, time and place for the presentation; and

(iv) A brief description of what will occur at the presentation including, if applicable, parties' rights to bring witnesses and/or counsel; and

(3) Each party has the right to be present during the other party's oral presentation. Nothing contained in this paragraph (b) of this section shall preclude the Mechanism from allowing an oral presentation by one party, if the other party fails to appear at the agreed upon time

and place, as long as all of the requirements of this paragraph have been satisfied.

(g) The Mechanism shall inform the consumer, at the time of disclosure required in paragraph (d) of this section that:

(1) If he or she is dissatisfied with its decision or warrantor's intended actions, or eventual performance, legal remedies, including use of small claims court, may be pursued;

(2) The Mechanism's decision is admissible in evidence as provided in section 110(a)(3) of the Act; and

(3) The consumer may obtain, at reasonable cost, copies of all Mechanism records relating to the consumer's dispute.

(h) If the warrantor has agreed to perform any obligations, either as part of a settlement agreed to after notification to the Mechanism of the dispute or as a result of a decision under paragraph (d) of this section, the Mechanism shall ascertain from the consumer within 10 working days of the date for performance whether performance has occurred.

(i) A requirement that a consumer resort to the Mechanism prior to commencement of an action under section 110(d) of the Act shall be satisfied 40 days after notification to the Mechanism of the dispute or when the Mechanism completes all of its duties under paragraph (d) of this section, whichever occurs sooner. Except that, if the Mechanism delays performance of its paragraph (d) of this section duties as allowed by paragraph (e) of this section, the requirement that the consumer initially resort to the Mechanism shall not be satisfied until the period of delay allowed by paragraph (e) of this section has ended.

(j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall

act in good faith, as provided in § 703.2(g) of this part. In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a)(3) of the Act.

§ 703.6. Recordkeeping.

(a) The Mechanism shall maintain records on each dispute referred to it which shall include:

(1) Name, address and telephone number of the consumer;

(2) Name, address, telephone number and contact person of the warrantor;

(3) Brand name and model number of the product involved;

(4) The date of receipt of the dispute and the date of disclosure to the consumer of the decision;

(5) All letters or other written documents submitted by either party;

(6) All other evidence collected by the Mechanism relating to the dispute, including summaries of relevant and material portions of telephone calls and meetings between the Mechanism and any other person (including consultants described in § 703.4(b) of this part);

(7) A summary of any relevant and material information presented by either party at an oral presentation;

(8) The decision of the members including information as to date, time and place of meeting, and the identity of members voting; or information on any other resolution;

(9) A copy of the disclosure to the parties of the decision;

(10) A statement of the warrantor's intended action(s);

(11) Copies of follow-up letters (or summaries of relevant and material portions of follow-up telephone calls) to the consumer, and responses thereto; and

(12) Any other documents and communications (or summaries of relevant and material portions of oral communications) relating to the dispute.

(b) The Mechanism shall maintain an index of each warrantor's disputes grouped under brand name and subgrouped under product model.

(c) The Mechanism shall maintain an index for each warrantor as will show:

(1) All disputes in which the warrantor has promised some performance (either by settlement or in response to a Mechanism decision) and has failed to comply; and

(2) All disputes in which the warrantor has refused to abide by a Mechanism decision.

(d) The Mechanism shall maintain an index as will show all disputes delayed beyond 40 days.

(e) The Mechanism shall compile semi-annually and maintain statistics which show the number and percent of disputes in each of the following categories:

(1) Resolved by staff of the Mechanism and warrantor has complied;

(2) Resolved by staff of the Mechanism, time for compliance has occurred, and warrantor has not complied;

(3) Resolved by staff of the Mechanism and time for compliance has not yet occurred;

(4) Decided by members and warrantor has complied;

(5) Decided by members, time for compliance has occurred, and warrantor has not complied;

(6) Decided by members and time for compliance has not yet occurred;

(7) Decided by members adverse to the consumer.

(8) No jurisdiction;

(9) Decision delayed beyond 40 days under § 703.5(e)(1) of this part;

(10) Decision delayed beyond 40 days under § 703.5(e)(2) of this part;

(11) Decision delayed beyond 40 days for any other reason; and

(12) Pending decision.

(f) The Mechanism shall retain all records specified in paragraphs (a) through (e) of this section for at least 4 years after final disposition of the dispute.

§ 703.7 Audits.

(a) The Mechanism shall have an audit conducted at least annually, to determine whether the Mechanism and its implementation are in compliance with this part. All records of the Mechanism required to be kept under § 703.6 of this part shall be available for audit.

(b) Each audit provided for in paragraph (a) of this section shall include at a minimum the following:

(1) Evaluation of warrantors' efforts to make consumers aware of the Mechanism's existence as required in § 703.2(d) of this part;

(2) Review of the indexes maintained pursuant to § 703.6 (b), (c), and (d) of this part; and

(3) Analysis of a random sample of disputes handled by the Mechanism to determine the following:

(i) Adequacy of the Mechanism's complaint and other forms, investigation, mediation and follow-up efforts, and other aspects of complaint handling; and

(ii) Accuracy of the Mechanism's statistical compilations under § 703.6(e) of this part. (For purposes of this subparagraph "analysis" shall include oral or written contact with the consumers involved in each of the disputes in the random sample.)

(c) A report of each audit under this section shall be submitted to the Federal Trade Commission, and shall be made available to any person at reasonable cost. The Mechanism may direct its auditor to delete names of parties to disputes, and identity of products involved, from the audit report.

(d) Auditors shall be selected by the Mechanism. No auditor may be involved with the Mechanism as a warrantor, sponsor or member, or employee or agent thereof, other than for purposes of the audit.

§ 703.8 Openness of records and proceedings.

(a) The statistical summaries specified in § 703.6(e) of this part shall be available to any person for inspection and copying.

(b) Except as provided under paragraphs (a) and (e) of this section, and paragraph (c) of § 703.7 of this part, all records of the Mechanism may be kept confidential, or made available only on such terms and conditions, or in such form, as the Mechanism shall permit.

(c) The policy of the Mechanism with respect to records made available at the Mechanism's option shall be set out in the procedures under § 703.5(a) of this part; the policy shall be applied uniformly to all requests for access to or copies of such records.

(d) Meetings of the members to hear and decide disputes shall be open to observers on reasonable and nondiscriminatory terms. The identity of the parties and products involved in disputes need not be disclosed at meetings.

(e) Upon request the Mechanism shall provide to either party to a dispute:

(1) Access to all records relating to the dispute; and

(2) Copies of any records relating to the dispute, at reasonable cost.

(f) The Mechanism shall make available to any person upon request, information relating to the qualifications of Mechanism staff and members.

Minnesota—New Motor Vehicle Warranties;
Manufacturer's Duty to Repair, Refund, or Replace

Minn. Stat. § 325F.665.

Subdivision 1. Definitions. For the purposes of this section, the following terms have the meanings given them:

(a) "consumer" means the purchaser or lessee, other than for purposes of resale or sublease, of a new motor vehicle used for personal, family, or household purposes at least 40 percent of the time, a person to whom the new motor vehicle is transferred for the same purposes during the duration of an express warranty applicable to the motor vehicle;

(b) "manufacturer" means a person engaged in the business of manufacturing, assembling or distributing motor vehicles, who will, under normal business conditions during the year, manufacture, assemble or distribute to dealers at least ten new motor vehicles;

(c) "manufacturer's express warranty" and "warranty" mean the written warranty of the manufacturer of a new motor vehicle of its condition and fitness for use, including any terms or conditions precedent to the enforcement of obligations under that warranty;

(d) "lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, used for personal, family, or household purposes at least 40 percent of the time, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease.

(e) "motor vehicle" means (1) a passenger automobile as defined in section 168.011, subdivision 7, including pickup trucks and vans, and (2) the self-propelled motor vehicle chassis or van portion of recreational equipment as defined in section 168.011, subdivision 25, which is sold or leased to a consumer in this state;

(f) "informal dispute settlement mechanism" means an arbitration process or procedure by which the manufacturer attempts to resolve disputes with consumers regarding motor vehicle nonconformities and repairs that arise during the vehicle's warranty period;

(g) "motor vehicle lessor" means a person who holds title to a motor vehicle leased to a lessee under a written lease agreement or who holds the lessor's rights under such agreement; and

(h) "early termination costs" means expenses and obligations incurred by a motor vehicle lessor as a result of an early termination of a written lease agreement and surrender of a motor vehicle to a manufacturer under subdivision 4, including penalties for prepayment of finance arrangements.

Subd. 2. Manufacturer's duty to repair. If a new motor vehicle does not conform to all applicable express warranties, and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during the term of the applicable express warranties or during the period of two years following the date of original delivery of the new motor vehicle to a consumer, whichever is the earlier date, the manufacturer, its agent, or its authorized dealer shall make the repairs necessary to conform the vehicle to the applicable express warranties, notwithstanding the fact that the repairs are made after the expiration of the warranty term or the two-year period.

Subd. 3. Manufacturer's duty to refund or replace. (a) If the manufacturer, its agents, or its authorized dealers are unable to conform the new motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use or market value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer shall either replace the new motor vehicle with a

comparable motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price, including the cost of any options or other modifications arranged, installed, or made by the manufacturer, its agent, or its authorized dealer within 30 days after the date of original delivery, and all other charges including, but not limited to, sales tax, license fees and registration fees, reimbursement for towing and rental vehicle expenses incurred by the consumer as a result of the vehicle being out of service for warranty repair, less a reasonable allowance for the consumer's use of the vehicle not exceeding ten cents per mile driven or ten percent of the purchase price, whichever is less. If the manufacturer offers a replacement vehicle under this section, the consumer has the option of rejecting the replacement vehicle and requiring the manufacturer to provide a refund. Refunds must be made to the consumer, and lienholder, if any, as their interests appear on the records of the registrar of motor vehicles. Refunds shall include the amount stated by the dealer as the trade-in value of a consumer's used motor vehicle, plus any additional amount paid by the consumer for the new motor vehicle. A reasonable allowance for use is that amount directly attributable to use by the consumer and any previous consumer during any period in which the use and market value of the motor vehicle are not substantially impaired. It is an affirmative defense to any claim under this section (1) that an alleged nonconformity does not substantially impair the use or market value, or (2) that a nonconformity is the result of abuse, neglect, or unauthorized modifications or alterations of a motor vehicle by anyone other than the manufacturer, its agent or its authorized dealer.

(b) It is presumed that a reasonable number of attempts have been undertaken to conform a new motor vehicle to the applicable express warranties, if (1) the same nonconformity has been subject to repair four or

more times by the manufacturer, its agents, or its authorized dealers within the applicable express warranty term or during the period of two years following the date of original delivery of the new motor vehicle to a consumer, whichever is the earlier date, but the nonconformity continues to exist, or (2) the vehicle is out of service by reason of repair for a cumulative total of 30 or more business days during the term or during the period, whichever is the earlier date.

(c) If the nonconformity results in a complete failure of the braking or steering system of the new motor vehicle and is likely to cause death or serious bodily injury if the vehicle is driven, it is presumed that a reasonable number of attempts have been undertaken to conform the vehicle to the applicable express warranties if the nonconformity has been subject to repair at least once by the manufacturer, its agents, or its authorized dealers within the applicable express warranty term or during the period of two years following the date of original delivery of the new motor vehicle to a consumer, whichever is the earlier date, and the nonconformity continues to exist.

(d) The term of an applicable express warranty, the two-year period and the 30-day period shall be extended by any period of time during which repair services are not available to the consumer because of a war, invasion, strike, or fire, flood, or other natural disaster.

(e) The presumption contained in paragraph (b) applies against a manufacturer only if the manufacturer, its agent, or its authorized dealer has received prior written notification from or on behalf of the consumer at least once and an opportunity to cure the defect alleged. If the notification is received by the manufacturer's agent or authorized dealer, the agent or dealer must forward it to the manufacturer by certified mail, return receipt requested.

(f) The expiration of the time periods set forth in paragraph (b) does not bar a consumer from receiving a refund or replacement vehicle under paragraph (a) if the reasonable number of attempts to correct the nonconformity causing the substantial impairment occur within three years following the date of original delivery of the new motor vehicle to a consumer, provided the consumer first reported the nonconformity to the manufacturer, its agent, or its authorized dealer during the term of the applicable express warranty.

(g) At the time of purchase or lease, the manufacturer must provide directly to the consumer a written statement on a separate piece of paper, in 10-point all capital type, in substantially the following form: "IMPORTANT: IF THIS VEHICLE IS DEFECTIVE, YOU MAY BE ENTITLED UNDER THE STATE'S LEMON LAW TO REPLACEMENT OF IT OR A REFUND OF ITS PURCHASE PRICE OR YOUR LEASE PAYMENTS. HOWEVER, TO BE ENTITLED TO REFUND OR REPLACEMENT, YOU MUST FIRST NOTIFY THE MANUFACTURER, ITS AGENT, OR ITS AUTHORIZED DEALER OF THE PROBLEM IN WRITING AND GIVE THEM AN OPPORTUNITY TO REPAIR THE VEHICLE. YOU ALSO HAVE A RIGHT TO SUBMIT YOUR CASE TO THE CONSUMER ARBITRATION PROGRAM WHICH THE MANUFACTURER MUST OFFER IN MINNESOTA."

(h) The amount of the sales tax to be paid by the manufacturer to the consumer under paragraph (a) shall be the tax paid by the consumer when the vehicle was purchased less an amount equal to the tax paid multiplied by a fraction, the denominator of which is the purchase price of the vehicle and the numerator of which is the allowance deducted from the refund for the consumer's use of the vehicle.

Subd. 4. Manufacturer's duty to consumers with leased vehicles. A consumer who leases a new motor vehicle has

the same rights against the manufacturer under this section as a consumer who purchases a new motor vehicle, except that, if it is determined that the manufacturer must accept return of the consumer's leased vehicle pursuant to subdivision 3, then the consumer lessee is not entitled to a replacement vehicle, but is entitled only to a refund as provided in this subdivision. In such a case, the consumer's leased vehicle shall be returned to the manufacturer and the consumer's written lease with the motor vehicle lessor must be terminated. The manufacturer shall then provide the consumer with a full refund of the amount actually paid by the consumer on the written lease, including all additional charges set forth in subdivision 3, if actually paid by the consumer, less a reasonable allowance for use by the consumer as set forth in subdivision 3. The manufacturer shall provide the motor vehicle lessor with a full refund of the vehicle's original purchase price plus any early termination costs, not to exceed 15 percent of the vehicle's original purchase price, less the amount actually paid by the consumer on the written lease.

Subd. 5. Resale or re-lease of returned motor vehicle. (a) If a motor vehicle has been returned under the provisions of subdivision 3 or a similar statute of another state, whether as the result of a legal action or as the result of an informal dispute settlement proceeding, it may not be resold or re-leased in this state unless:

(1) the manufacturer provides the same express warranty it provided to the original purchaser, except that the term of warranty need only last for 12,000 miles or 12 months after the date of resale, whichever is earlier, and

(2) the manufacturer provides the consumer with a written statement on a separate piece of paper, in 10-point all capital type, in substantially the following form: "IMPORTANT: THIS VEHICLE WAS RETURNED TO THE MANUFACTURER BECAUSE IT DID NOT

CONFORM TO THE MANUFACTURER'S EXPRESS WARRANTY AND THE NONCONFORMITY WAS NOT CURED WITHIN A REASONABLE TIME AS PROVIDED BY MINNESOTA LAW."

The provisions of this section apply to the resold or released motor vehicle for full term of the warranty required under this subdivision.

(b) Notwithstanding the provisions of paragraph (a), if a new motor vehicle has been returned under the provisions of subdivision 3 or a similar statute of another state because of a nonconformity resulting in a complete failure of the braking or steering system of the motor vehicle likely to cause death or serious bodily injury if the vehicle was driven, the motor vehicle may not be resold in this state.

Subd. 6. Alternative dispute settlement mechanism. (a) Any manufacturer doing business in this state, entering into franchise agreements for the sale of its motor vehicles in this state, or offering express warranties on its motor vehicles sold or distributed for sale in this state shall operate, or participate in, an informal dispute settlement mechanism located in the state of Minnesota which complies with the provisions of the Code of Federal Regulations, title 16, part 703, and the requirements of this section. The provisions of subdivision 3 concerning refunds or replacement do not apply to a consumer who has not first used this mechanism before commencing a civil action, unless the manufacturer allows a consumer to commence an action without first using this mechanism.

(b) An informal dispute settlement mechanism provided for by this section shall, at the time a request for arbitration is made, provides [sic] to the consumer and to each person who will arbitrate the consumer's dispute, information about this section as approved and directed by the attorney general, in consultation with interested parties. The informal dispute settlement mechanism shall

permit the parties to present or submit any arguments based on this section and shall not prohibit or discourage the consideration of any such arguments. In developing and approving information about this section as provided herein, the attorney general is not subject to the rulemaking provisions of chapter 14.

(c) If, in an informal dispute settlement mechanism, it is decided that a consumer is entitled to a replacement vehicle or refund under subdivision 3, then any refund or replacement offered by the manufacturer or selected by a consumer shall include all amounts authorized by subdivision 3.

(d) No documents shall be received by any informal dispute settlement mechanism unless those documents have been provided to each of the parties in the dispute at or prior to the mechanism's meeting, with an opportunity for the parties to comment on the documents either in writing or orally. If a consumer is present during the informal dispute settlement mechanism's meeting, the consumer may request postponement of the mechanism's meeting to allow sufficient time to review any documents presented at the time of the meeting which had not been presented to the consumer prior to the meeting.

(e) The informal dispute settlement mechanism shall allow each party to appear and make an oral presentation in the state of Minnesota unless the consumer agrees to submit the dispute for decision on the basis of documents alone or by telephone, or unless the party fails to appear for an oral presentation after reasonable prior written notice. If the consumer agrees to submit the dispute for decision on the basis of documents alone, then manufacturer or dealer representatives may not participate in the discussion or decision of the dispute.

(f) Consumers shall be given an adequate opportunity to contest a manufacturer's assertion that a nonconformity falls within intended specifications for the vehicle by

having the basis of the manufacturer's claim appraised by a technical expert selected and paid for by the consumer prior to the informal dispute settlement hearing.

(g) Where there has been a recent attempt by the manufacturer to repair a consumer's vehicle, but no response has yet been received by the informal dispute mechanism from the consumer as to whether the repairs were successfully completed, the parties must be given the opportunity to present any additional information regarding the manufacturer's recent repair attempt before any final decision is rendered by the informal dispute settlement mechanism. This provision shall not prejudice a consumer's rights under this section.

(h) If the manufacturer knows that a technical service bulletin directly applies to the specific mechanical problem being disputed by the consumer, then the manufacturer shall provide the technical service bulletin to the consumer at reasonable cost. The mechanism shall review any such technical service bulletins submitted by either party.

(i) A consumer may be charged a fee to participate in an informal dispute settlement mechanism required by this section, but the fee may not exceed the conciliation court filing fee in the county where the arbitration is conducted.

(j) Any party to the dispute has the right to be represented by an attorney in an informal dispute settlement mechanism.

(k) The informal dispute settlement mechanism has all the evidence-gathering powers granted an arbitrator under section 572.14.

(l) A decision issued in an informal dispute settlement mechanism required by this section may be in writing and signed.

Subd. 7. Effect and admissibility of decision by informal dispute settlement mechanism. The decision issued in an informal dispute settlement mechanism required by this section is nonbinding on the parties involved, unless otherwise agreed by the parties. Any party, upon application, may remove the decision to district court for a trial de novo. If an application to remove a decision is not filed in the district court within 30 days after the date the decision is received by the parties, then the district court shall, upon application of a party, issue an order confirming the decision. A written decision issued by an informal dispute settlement mechanism, and any written findings upon which the decision is based, are admissible as nonbinding evidence in any subsequent legal action and are not subject to further foundation requirements.

Subd. 8. Treble damages for bad faith appeal of decision. If the district court finds that a party has removed a decision of an informal dispute settlement mechanism in bad faith, by asserting a claim or defense that is frivolous and costly to the other party, or by asserting an unfounded position solely to delay recovery by the other party, then the court shall award to the prevailing party three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees.

Subd. 9. Civil remedy. Any consumer injured by a violation of this section may bring a civil action to enforce this section and recover costs and disbursements, including reasonable attorney's fees incurred in the civil action. In addition to the remedies provided herein, the attorney general may bring an action pursuant to section 8.31 against any manufacturer for violation of this section.

Subd. 10. Limitation on actions. A civil action brought under this section must be commenced within three years of the date of original delivery of the new motor vehicle

to a consumer; except that, if the consumer applies to an informal dispute settlement mechanism within three years of the date of original delivery of a new motor vehicle to a consumer, then any civil action brought under this section must be commenced within six months after the date of the final decision by the mechanism.

Subd. 11. Remedy nonexclusive. Nothing in this section limits the rights or remedies which are otherwise available to a consumer under any other law.

Subd. 12. Disclosure requirement. In addition to any investigative powers authorized by law, the attorney general may inspect the records of the informal dispute settlement mechanism upon reasonable notice, during regular business hours, and may make available to the public information about the operation of the mechanism, but data on an individual may not be disclosed without the prior consent of the individual.

Laws 1983, c. 108, § 1. Amended by Laws 1985, c. 284, § 1, eff. Jan. 1, 1986; Laws 1986, c. 422, art. 1, § 1, eff. Aug. 1, 1986; Laws 1986, c. 444; Laws 1987, c. 52, § 1, eff. Aug. 1, 1987; Laws 1987, c. 268, art. 4, § 23.

APPENDIX E

Rule 28.1 Listing

Alfa Romeo—parent companies, Chrysler Motors, Inc. and Fiat Auto S.P.A. (Italian corporation)

American Suzuki Motor Corp.—parent company, Suzuki Motor Company (Japanese corporation)

BMW North America, Inc.—parent company, Bayerische Motoren Werke, AG

Hyundai Motor America—parent company, Hyundai Motor Company (Korean corporation)

Isuzu Motors America, Inc.—parent company, Isuzu Motors, Ltd. (Japanese corporation)—affiliate, American Isuzu Motors, Inc.

Jaguar Cars Inc.—parent company, Jaguar Cars Overseas Holding Ltd., a wholly owned subsidiary of Jaguar plc (British corporation)

Mazda Motors of America, Inc.—parent companies, Mazda Motor Corporation; Samito Corporation; C. Itoh & Co., Ltd. (Japanese corporations)

Mitsubishi Motor Sales of America, Inc.—parent companies, Mitsubishi Corporation (Japanese corporation); Mitsubishi International Corporation (Japanese corporation); Mitsubishi Motors Corporation (Japanese corporation); affiliate Diamond Star Motor Corporation

Nissan Motor Corporation in U.S.A.—parent company, Nissan Motor Co., Ltd. (Japanese corporation)—affiliates, Nissan Motor Corporation in Hawaii, Ltd., Nissan CR Corporation, Nissan Design International, Inc., Nissan Finance of America, Inc., Nissan Industrial Equipment Co., Nissan Motor Acceptance Corporation, Nissan Motor Acceptance Corporation Holdings, Inc., Nissan Motor Manufacturing Corporation U.S.A., Nissan Research & Development, Inc., Nissan Textile Machinery

Corporation in U.S.A., Nissan Trading Corp., U.S.A., Nissan Extended Service Corporation, Inc.

Peugeot Motors of America, Inc.—parents, Automobile Peugeot; Peugeot S.A. (French corporations)—affiliate, Cycles Peugeot

Porsche Cars North America, Inc.—parent company, Porsche Enterprises, Inc.—affiliate, Porsche Motorsport America

Rolls-Royce Motor Cars Inc.—parent company, Vickers America Holdings, Inc.—affiliates, Crabtree-Vickers Inc.; Howson-Algraphy Inc.; Imperial Metal & Chemical Company Inc.; Jered Brown Brothers, Inc.; KaMeWa USA Inc.; and Medelec Inc. dba Teco Corporation

Saab-Scania of America, Inc.—parent company, Saab-Scania Holdings Corporation—affiliates, Saab Aircraft of America; Saab-Scania Financial Services Corporation; Everett Charles Test Equipment; Lambert Leasing

Volvo North America Corporation—parent company, AB Volvo (Swedish corporation)—affiliates, Volvo-GM Heavy Truck Corp., VME Americas, Inc., Park Rich Corp.

Yugo America, Inc.—Yugo is currently in Chapter 11 bankruptcy proceedings. Prior to filing under Chapter 11 Yugo's parent was Global Motors. If the bankruptcy plan is approved, the parent will be Zavodi Crvena Zastava (Yugoslavian corporation).

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* AIA members are either U.S. corporate affiliates of foreign motor vehicle manufacturers or U.S. importers authorized by such manufacturers, virtually all of which are subsidiaries of their foreign manufacturers. For the sake of brevity, the list of affiliate corporations has been limited to U.S. domestic corporations, except for parent corporations.

Supreme Court, U.S.
FILED
AUG 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-72

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AUTOMOBILE IMPORTERS OF AMERICA, INC., ET AL.,
Petitioners,

v.

STATE OF MINNESOTA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Magnuson-Moss Warranty Act was enacted by Congress to make warranties more understandable and enforceable for consumers. Among its provisions, it encourages warrantors to establish informal arbitration mechanisms whereby consumer complaints can be fairly and expeditiously settled. Congress also directed the Federal Trade Commission to promulgate "minimum requirements" intended to promote the independence of these informal arbitration programs.

The question presented is:

Whether the Magnuson-Moss Act provisions encouraging the establishment of informal arbitration programs and authorizing the Federal Trade Commission to set minimum standards preempts any additional state requirements for such programs.

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H.R. Rep. No. 1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7702 and 7722 13

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-72

AUTOMOBILE IMPORTERS OF AMERICA, INC., ET AL.,
Petitioners,

v.

STATE OF MINNESOTA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the State of Minnesota and its Attorney General Hubert H. Humphrey III, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 871 F.2d 717 (1989). The opinion of the United States District Court for the District of Minnesota is reported at 681 F. Supp. 1374 (1988).

STATEMENT OF THE CASE

Petitioners are foreign car manufacturers and their trade association, Automobile Importers of America, Inc. They seek to invalidate Minn. Stat. § 325F.665, subd. 6 (1988) ("Lemon Law"). Petitioners contend that three provisions of the Minnesota Lemon Law are preempted by the Magnuson-Moss Warranty Act ("Magnuson-Moss" or "the Act"), 15 U.S.C. § 2301 *et seq.* (1982), enacted by Congress in 1975. The auto makers challenge Minnesota Lemon Law provisions that: (1) require a manufacturer to operate or participate in a non-binding arbitration mechanism located in the State of Minnesota, Minn. Stat. § 325F.665, subd. 6(a); (2) require the arbitration mechanism to provide for an oral hearing if either party requests it, *Id.*, subd. 6(e); and (3) give a manufacturer the option of charging the consumer a nominal fee (not to exceed the filing fee for Conciliation Court, usually $10-20) to participate in the arbitration mechanism. *Id.*, subd. 6(i). (The auto makers' petition devotes scant attention to this last challenged element of the Lemon Law, perhaps in realization that a warrantor is not required to charge a fee or in recognition of the Eighth Circuit's observation that the fee is *de minimus* and not sufficient to deter consumer participation in arbitration programs. Pet. App. 17a.)

The United States District Court for the District of Minnesota held that the Minnesota Lemon Law provisions were not preempted by Magnuson-Moss. The United States Court of Appeals for the Eighth Circuit affirmed.

A. The Magnuson-Moss Warranty Act

Magnuson-Moss is a statute of limited scope and provides limited protections for consumers. Enacted by Congress in 1975, it is primarily a disclosure statute designed to insure that manufacturers' warranties do not mislead consumers. The Act does not require that products be warranted at all; it is primarily concerned with regulating the manner and form of disclosures and not the substantive terms of the warranties.

In addition to its disclosure requirements, Magnuson-Moss also provides for manufacturers to establish "informal dispute settlement mechanisms" through which consumer disputes concerning warranties can be settled. 15 U.S.C. § 2310 (1982). Any manufacturer which chooses to incorporate such an arbitration mechanism into its warranty documents must comply with the "minimum requirements" established pursuant to Federal Trade Commission Regulations, specifically "Rule 703" (16 C.F.R. § 703).

While Magnuson-Moss was clearly meant to expand the FTC's jurisdiction in the area of consumer protection, the Act itself delineates its relationship to state laws:

> (b) Rights, remedies, and liabilities
>
> (1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.
>
> (c) State warranty laws
>
> (1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—
>
> (A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

15 U.S.C. § 2311 (1982). Subsection (b) is commonly referred to as a "savings clause" and subsection (c) is referred to as a "preemption clause."

The Act's broad "savings clause" and clearly defined, narrow "preemption clause," evidence Congress' intent that the states remain free to craft remedies for consumers seeking redress regarding warranty disputes. If Congress had intended to preempt the states in the area of arbitration mechanisms, Congress could have easily included section 2310 among the preemptive provisions of section 2311(c) (1). Congress did no such thing. As contemplated by Congress, the Minnesota Lemon Law provides rights and remedies for consumers which supplement the consumer protection goals of Magnuson-Moss.

B. The Minnesota Lemon Law

In 1983, Minnesota became the third state to adopt a Lemon Law to establish protection for the owners of new cars who experience substantial and repeated repair problems. The Lemon Law has been amended twice, including the 1987 amendments which petitioners challenge in this petition. As amended, the law applies to any written express warranties on the vehicle for the length of the warranty, or two years, whichever comes first. Minn. Stat. § 325F.665, subd. 2 (1988),

Pet. App. 70a. If the manufacturer or authorized dealer is unable to repair a substantial problem covered by the warranty after a reasonable number of attempts, the consumer may seek a refund of the purchase price minus a reasonable deduction for the consumer's use of the vehicle. *Id.*, subds. 6, 7, and 9, Pet. App. 75a-78a. A manufacturer may require that a consumer use the manufacturer's arbitration mechanism prior to commencing a civil action. *Id.*, subd. 6(a), Pet. App. 75a. A manufacturer may unilaterally release a consumer from the "prior resort" requirement. *Id.*, Pet. App. 75a. If a manufacturer offers a replacement vehicle, the consumer may either accept the replacement vehicle or choose a refund. *Id.*, subd. 3, Pet. App. 70a-71a. The manufacturer need not make a refund or replace the vehicle if the problem does not substantially impair the use or market value of the vehicle, or if the problem is the result of the consumer's abuse, neglect or unauthorized modification of the vehicle. *Id.*, Pet. App. 71a.

In 1987, the Minnesota Legislature adopted amendments to the Minnesota Lemon Law. The purpose of the 1987 amendments was to ensure that consumers had access to a fast, fair, and affordable forum when they were saddled with a "lemon" car. The 1987 amendments require a manufacturer to operate or participate in a non-binding arbitration mechanism located in the State of Minnesota. Minn. Stat. § 325F.665, subd. 6(a) (1988), Pet. App. 75a. That program must comply with the FTC's Rule 703 requirements for arbitration programs as well as the requirements of state law. *Id.*, Pet. App. 75a. The arbitration mechanism must provide for an oral hearing if either party requests it. *Id.*, subd. 6(e), Pet. App. 76a. Under the law, a manufacturer has the option of charging the consumer a nominal fee to participate in the arbitration mechanism, but such fee may not exceed the filing fee for Conciliation

Court. *Id.*, subd. 6(i), Pet App. 77a. The decision of the arbitrator or arbitrators is not binding on the parties, unless otherwise agreed by the parties. *Id.*, subd. 7, Pet. App. 78a. Any party may remove the proceeding to district court for trial *de novo*. *Id.*, Pet. App. 78a.

The Minnesota Lemon Law sets forth standards for the operation of arbitration mechanisms. Manufacturers are free to design and operate their own programs or, if they prefer, participate in a program operated by an independent entity such as the Better Business Bureau or the American Arbitration Association.

C. Proceedings Below

On March 25, 1988, the District Court, the Honorable Diana E. Murphy presiding, granted summary judgment to defendants, State of Minnesota, with respect to plaintiffs' preemption challenge to the Minnesota Lemon Law. Relying upon the express language of Magnuson-Moss, the legislative history of the Act, FTC regulations, FTC statements, and judicial decisions regarding the issue, the District Court held that the Minnesota Lemon Law was not preempted by Magnuson-Moss or regulations promulgated thereunder.

On March 17, 1989, the Eighth Circuit, Judges Heaney, Henley and Fagg presiding, affirmed the District Court decision. The Eighth Circuit turned aside petitioner's preemption arguments, holding that: (1) Congress did not occupy the area of informal dispute resolution mechanisms; (2) the challenged provisions of the Minnesota Lemon Law did not conflict directly with the federal scheme; and (3) the Minnesota Lemon Law did not frustrate the broad goal of enhancing consumer protection or the specific goal of encouraging warrantor participation in arbitration mechanisms. Pet. App. 10a, 12a, 15a-17a.

REASONS FOR DENYING THE WRIT

This case does not merit review by this Court. The Eighth Circuit Court of Appeals, in a thoughtful and well-reasoned decision, found that Congress never intended to displace state laws which regulate arbitration mechanisms. The Court found that the Minnesota Lemon Law furthered the goals of Magnuson-Moss and supplemented the federal law. Pet. App. 17a. There are several reasons why the auto manufacturers' petition should be denied.

First, the Eighth Circuit Court of Appeals fully considered and correctly decided the issues in this matter. Relying upon the language, structure, and legislative history of the Act, and opinions issued by the Fifth Circuit and the FTC itself, the Eighth Circuit found no "clear statement" of federal occupation in this area, no impermissible conflict between federal and state law, and no frustration of the purposes and objectives of Congress. Petitioners' reference to *Taylor v. General Motors Corp.*, No. 87-5829 (11th Cir. June 14, 1989) (available on Westlaw) (to be reported at 875 F.2d 816) (no presumption against preemption when deciding whether state law *conflicts* with federal law), fails to require a conclusion that the Eighth Circuit misread federal law.

Second, there is no actual conflict in the circuit courts. Only two circuits have analyzed the issue regarding state regulation, *via Lemon Laws*, of arbitration mechanisms. Both the Eighth Circuit, in this matter, and the Fifth Circuit, *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985), have held that the states possess authority to regulate arbitration mechanisms beyond the "minimum requirements" set forth in Rule 703. Petitioners' reliance upon *Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987), as support for the existence of a conflict in the circuit courts is misplaced.

The facts of *Wolf* and the legal analysis from the case which petitioners rely upon fail to present a conflict with the decisions reached by the Eighth and Fifth Circuits.

Third, the specific issues presented in this matter have recently been considered by a federal district court in New York. *See Motor Vehicle Mfrs. Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988). Although the District Court held that Magnuson-Moss did preempt the challenged New York Lemon Law provisions, the State of New York is pursuing an appeal to the Second Circuit. By waiting for a decision from the Second Circuit Court of Appeals, this Court would have the benefit of further analysis and discussion of the issues at hand, and an additional indication whether there is indeed any conflict among the circuits.

Finally, the decision reached by the Eighth Circuit was a fair result. As noted in the auto manufacturers' petition, more than 40 states have enacted Lemon Laws during the past seven years. The legislative explosion in this area is due in large part to the auto makers' failure to voluntarily establish programs satisfying even the "minimum requirements" set out in Rule 703. Forty-six states, including Minnesota, have stepped into the regulatory void and enacted legislation ensuring consumers access to a fast, fair and affordable forum to resolve warranty disputes.

1. The Eighth Circuit Correctly Decided That The Minnesota Lemon Law Supplements Magnuson-Moss And Regulations Promulgated Thereunder.

Implied preemption of state laws occurs under certain limited circumstances.

> If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. . . .

> If Congress has not entirely displaced state regulations over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Louisiana Public Service Comm'n v. F.C.C., 106 S.Ct. 1890, 1896 (1986). Petitioners fail to make a case that any of these preemption theories are applicable to this matter.

Petitioners assert that the Eighth Circuit misread federal law and gave "too much deference to state regulation and too little to federal regulation." Pet. 12. Their conclusion is based upon a reading of Magnuson-Moss that mischaracterizes and trivializes the true purpose of the Act—consumer protection—an area that has traditionally been regulated by the states.

Reduced to its essence, the petitioners' argument is that once Congress legislates in a particular area, any additional regulation by the states upsets the "balance" of the federal legislation. Petitioners' view of Congress' intent ignores the traditional role of federal legislation.

> Federal legislation has traditionally occupied a limited role as the *floor* of safe conduct; before transforming such legislation into a *ceiling* on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance [citations omitted], courts should wait for a clear statement of congressional intent to work such an alteration.

Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1543 (D.C. Cir. 1984) (emphasis in original). *See also Florida Lime And*

Avocado Growers, Inc. v. Paul, 373 U.S. 132, 147-48 (1963); *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987).

The Eighth Circuit found no "clear statement" of congressional intent in Magnuson-Moss to occupy the field of regulation of arbitration mechanisms. The Court therefore concluded that the central focus of the federal regulation was the enhancement of consumer protection—not setting in stone some federal notion of balance between warrantors' desires and consumers' needs. Indeed, the Eighth Circuit found ample evidence to indicate that Congress contemplated supplemental state regulation in this area. Pet. App. 8a-9a. The broad savings clause of the Act followed by explicitly delineated areas of preemption demonstrates Congress' intent to permit supplemental state regulation in areas not specifically preempted.

In reaching its decision, the Eighth Circuit relied upon the express language, structure, and legislative history of the Act, the nature of the regulations set forth in Rule 703, an analysis of the same issues by the Fifth Circuit Court of Appeals and pronouncements by the Federal Trade Commission. To avoid duplication and heed this Court's admonition to keep response briefs as short as possible, Supreme Court Rule 22.2, the State of Minnesota directs the Court's attention to the Eighth Circuit's analysis. Pet. App. 6a-10a. The thorough and correct analysis by the Eighth Circuit clearly indicates that Congress had no intention of occupying the field of regulation of arbitration mechanisms.

Petitioners also offer *Taylor v. General Motors Corp.*, No. 87-5829 (11th Cir. June 14, 1989) (available on Westlaw) (to be reported at 875 F.2d 816) for their position that the Eighth Circuit inappropriately required a "clear statement of

occupation" in its preemption analysis. Pet. 12. Petitioners' reliance on *Taylor* is based upon a faulty premise, however. As noted above, there are three distinct theories of implied preemption: occupation of the field; conflict with federal law; and frustration of the full purposes and objectives of Congress.

Assuming arguendo that the *Taylor* court correctly stated that "no such [strong presumption against preemption] is applicable in deciding whether state law *conflicts* with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights," *Id.*, slip op. at 12 (emphasis added), the clear fact remains that petitioners are comparing apples to oranges. In footnote 14 of *Taylor*, the Eleventh Circuit notes that "the manufacturers concede that Congress did not intend to occupy the entire field of automotive safety: therefore, [this] type of preemption is not applicable to this case." The occupation theory of implied preemption was not at issue in *Taylor* and petitioners' use of the language from that case is an erroneous generalization.

The Eighth Circuit aligned itself with the Fifth Circuit on the requisite congressional intent to infer federal occupation of a field: "We agree with the Fifth Circuit that to infer preemption in an area traditionally regulated by the states—consumer protection through warranty law—requires a 'clear statement' of occupation. We find no 'clear statement' of congressional intent to preempt here." Pet. App. 8a. More importantly, the Eighth Circuit concluded that the language, structure and history of Magnuson-Moss all emphasize its "supplemental, rather than preemptive nature." *Id.* Petitioners' reliance on *Taylor* fails to yield a judgment that the Eighth Circuit misread federal law.

Petitioners also contend that the Minnesota Lemon Law impermissibly interferes with the regulatory scheme embodied in Magnuson-Moss and Rule 703. Pet. 19 *et seq.* This preemption theory was also rejected by the Eighth Circuit. *See also Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985); *Chrysler Corp. v. Armstrong*, No. 83-45 (D. Ky. April 30, 1985). In large part, this is based upon reluctance to infer preemption: the "teaching of this Court's decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exists." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

There is no direct conflict between the Minnesota law and the federal rules. As the Eighth Circuit observed, "Minnesota requires automobile manufacturers to establish or participate in an informal dispute resolution mechanism satisfying FTC requirements. Federal law makes warrantors' participation in such mechanisms optional. Strictly speaking, compliance with both laws is not a physical impossibility. When an automobile manufacturer complies with Minnesota's law by providing an informal dispute mechanism, that manufacturer is not violating federal law." Pet. App. 11a. The same analysis is equally germane to the Lemon Law provision that permits each party to appear and make an oral presentation. Minn. Stat. § 325F.665, subd. 6(e) (1988). Pet. App. 76a. "If the warrantor and consumer abide by the Minnesota rule, then the FTC rule is not violated." Pet. App. 11a-12a. *See* FTC Staff Opinion attached to *Chrysler Corp. v. Armstrong*, No. 83-45 (D. Ky. April 30, 1985) (relevant parts of the FTC Staff Opinion can be found at Pet. App. 9a-11a).

Petitioners' conflict theory is dependent upon the holding in *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 479 U.S. 272 (1987). The District Court below explained:

> Plaintiffs' reliance on *Fidelity* is misplaced, however. *Fidelity* involved a situation where federal law gave entities an option to include such clauses while state law prohibited them from doing so. Magnuson-Moss gives manufacturers the option to establish informal dispute settlement mechanisms. The lemon law does not prohibit manufacturers from establishing such mechanisms, as was the case in *Fidelity*, but rather requires them to do so. *Fidelity* therefore does not require a finding that the lemon law is in actual conflict with the federal law.

Pet. App. 28a-29a.

Furthermore, the petitioners' "reliance on *Fidelity* is plausible only if Magnuson-Moss is interpreted as granting to manufacturers an affirmative right *not* to offer settlement mechanisms." Pet. App. 29a. (Emphasis in original).

The petitioners' crabbed reading of Magnuson-Moss also failed to persuade the Eighth Circuit. The appellate court in *Fidelity* correctly pointed out that the Federal Home Loan Bank Board clearly expressed the policy that the option of whether to have a "due on sale" clause was an important policy objective of the federal rule. "No such congressional policy of 'flexibility' exists in the adoption of the Magnuson-Moss Warranty Act." Pet. App. 14a. The professed purpose of Magnuson-Moss is enhancement of consumer protection, and requiring warrantor participation in arbitration programs is entirely consistent with that purpose. Pet. App. 12a; H.R. Rep. No. 1107, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7702 and 7722.

Petitioners "think that the difference between 'encouraging' mechanisms and mandating them is self-evident." Pet. 22. Yet, in a recent proceeding in a New York federal district court,

petitioners themselves appear to agree that they are consistent. In *Motor Vehicle Manufacturers Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988), the district court agreed with petitioners that the Minnesota law does not obstruct the goal of encouraging manufacturers' participation in arbitration programs. "We agree with Plaintiffs [Automobile Importers of America, Inc. and Motor Vehicle Manufacturers of the United States, Inc.] that since the Minnesota statute *requires* manufacturers to establish informal dispute settlement mechanisms (*A.I.A. v. Minnesota*, 681 F. Supp. at 1376), it cannot be attacked as obstructing the goal of *encouraging* them to do so, and thus it is distinguishable." *Id.* at 737 (emphasis added). The State of Minnesota agrees that its Lemon Law supplements the Congressional goal of encouraging warrantor participation in arbitration programs. *See also* Pet. App. 15a-16a.

Additionally, the State of Minnesota maintains that the district court was correct in its assessment that "[A]lthough the legislative history suggests some concern with fairness to manufacturers, the overriding intent behind Magnuson-Moss appears to have been to enhance consumer protections. The legislative history reflects a perception on the part of Congress that consumers were inadequately protected. Plaintiffs' contention that a significant congressional purpose behind Magnuson-Moss was to convey rights to manufacturers is unsupported." Pet. App. 29a-30a. After analyzing separately each aspect of the Minnesota Lemon Law, the Eighth Circuit also concluded that the state law did not frustrate the purposes of Magnuson-Moss. Pet. App. 12a-17a.

Petitioners' arguments were fully considered and properly rejected by both lower courts. No further review is warranted.

2. There Is No Conflict In The Circuit Courts Regarding The Question Presented In This Matter.

Petitioners cite two cases for their assertion that there is a conflict in the circuit courts regarding the issue presented in this matter: *Chrysler Corp. v. Texas Motor Vehicles Comm'n*, 755 F.2d 1192 (5th Cir. 1985), and *Wolf v. Ford Motor Corp.*, 829 F.2d 1227 (4th Cir. 1987). A careful reading of the two cases fails to yield the conclusion posited by petitioners.

In *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, the Fifth Circuit rejected the contention that § 2310 of Magnuson-Moss or Rule 703 evidenced congressional intent to occupy the field of regulation of arbitration programs. In holding that the Texas Lemon Law was not preempted, the Fifth Circuit stated:

> [H]ere we find no clear statement either in the express language of section 2310 or in its legislative history of any intention by Congress to occupy the field of informal settlement mechanisms for warranty disputes. To the contrary, we find substantial indications that state-created avenues of relief such as those offered by the lemon law are not preempted by Magnuson-Moss. As noted above, *section 2311 of Magnuson-Moss preserves for consumers any rights or remedies created by state law.*

755 F.2d at 1205 (emphasis added).

The Fifth Circuit also held that the Texas Lemon Law did not conflict directly with the federal scheme nor did it interfere with the attainment of the full purposes and objectives of Congress in enacting Section 2310. *Id.* at 1205-06.

Petitioners wrench a single sentence from the Fifth Circuit's opinion and seek to draw a distinction between the state-run program in *Chrysler* and the programs required by the

Minnesota Lemon Law: "We think it plain that the preclusive effect of section 110 (15 U.S.C. § 2310) is limited to rules governing informal dispute resolution procedures created by private warrantors and does not effect such schemes where provided as an option for consumers by state law." Pet. 14.

The Eighth Circuit correctly placed emphasis on the phrase "does not effect such schemes where provided as an option for consumers by state law." Pet. App. 8a. The State of Minnesota has provided "an option for consumers by state law" that supplements the minimum requirements set forth in Magnuson-Moss and its implementing regulations. In Minnesota, the arbitration option is not "created by private warrantors," but is mandated by state law. The fact that the Minnesota law falls short of creating a state bureaucracy does not diminish its nature as a state right or remedy preserved to the states by Section 2311 of Magnuson-Moss. Indeed, the Minnesota Lemon Law gives auto makers the flexibility of creating their own arbitration programs or making arrangements with a third party, such as the Better Business Bureau or American Arbitration Association. Petitioners' arguments that *Chrysler Corp. v. Texas Motor Vehicles Comm'n* manifests a conflict between the Fifth and Eighth Circuits is unsupported. Rather, the Eighth Circuit relied heavily upon the Fifth Circuit's analysis in reaching its own decision in this matter. Pet. App. 10a, 16a.

In *Wolf v. Ford Motor Company*, 829 F.2d 1277 (4th Cir. 1987), the Fourth Circuit upheld the dismissal of a common law fraud action, holding that such an action was preempted by Magnuson-Moss and Rule 703. For a variety of reasons, *Wolf* fails to present a conflict with the instant case.

The issue presented by the manufacturers' petition was not before the court in *Wolf*. As noted by the district court below,

the dispute here "concerns the power of a state legislature to attempt to enhance protections accorded consumers by federal law." Pet. App. 25a. A crucially different factual dispute was heard and decided by the Fourth Circuit. In *Wolf*, a dissatisfied consumer charged that Ford Motor Company had fraudulently represented that its private arbitration board was independent and impartial. Here, the auto manufacturers are the moving party, maintaining that a state lemon law statute should be swept aside. The action in *Wolf* did not involve a state lemon law statute, Pet. App. 25a, and is necessarily a different factual matter than the cases heard by the Eighth and Fifth Circuits.

Further, the Fourth Circuit reached its decision without the benefit of the views of the FTC or the State of Virginia, the two parties most affected by the appellate court's judgment. Again, the different factual scenario is a likely explanation for the absence of commentary by those parties. Finally, the Fourth Circuit issued its decision despite the absence of any reference to the statutory language of Magnuson-Moss or its legislative history. In sum, the *Wolf* case fails to present an actual conflict with this case and the Fifth Circuit decision in *Chrysler*.

3. Consideration Of The Issue Presented Would Not Be A Wise Use Of The Supreme Court's Resources.

Another case is working its way through the federal court system which could result in a thorough delineation of this issue by another Circuit Court of Appeals. *See Motor Vehicle Manufacturers Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988). In *Abrams*, the petitioners in the instant case, joined by the Motor Vehicle Manufacturers Association (representing

the domestic auto manufacturers), challenge on preemption grounds provisions of the New York Lemon Law that impose additional requirements beyond those required by Magnuson-Moss and Rule 703, including a requirement that arbitration programs allow oral hearings if the consumer so requests. New York General Business Law § 198-a(m) (1) (i).

On October 13, 1988, the United States District Court for the Southern District of New York issued a decision upholding the auto makers' preemption arguments. The State of New York is pursuing an appeal of the District Court decision, but that appeal has been delayed by the procedural posture of the case. (The auto makers challenged other provisions of the New York Lemon Law on Commerce Clause grounds. The presiding judge has denied the State of New York's motion for an expedited appeal on the preemption claim, pending a final judgment on the Commerce Clause issues before the court. The Commerce Clause issues have been briefed and argued; the parties are waiting for a decision by the court.)

The Second Circuit Court of Appeals may soon have an opportunity to analyze the identical issues presented to this Court. The benefit to this Court is clear. If the Second Circuit accepts the arguments regarding preemption advanced by the State of New York, it will align itself with the Eighth and Fifth Circuits. Such unanimity in the circuit courts would obviate the need for review by this Court. If the Second Circuit were to find itself in agreement with the auto makers, then there would be an actual conflict in the circuit court system. Any subsequent review of the matter by this Court would have the benefit of further discussion and analysis by the Second Circuit.

4. The Eighth Circuit Rendered A Fair Decision.

This Court should not overlook the fairness of the decision handed down by the Eighth Circuit Court of Appeals. Petitioners' "balance" arguments notwithstanding, the primary purpose of Magnuson-Moss is enhancement of consumer protection. That purpose is vividly illustrated in the Act's legislative history, which reflects the inequities between consumers and manufacturers:

> Paralleling the growth of acquisition of consumer products has been a growing concern of the American consumer with the quality and durability of many of those products. Another growing source of resentment has been the inability to get many of those products properly repaired and the developing awareness that the paper with the filigree border bearing the bold caption "Warranty" or "Guarantee" was often of no greater worth than the paper it was printed on. Indeed, in many cases where a warranty or guarantee was ostensibly given the old saying applied "The bold print giveth and the fine print taketh away." For the paper operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law leaving little in its stead.

H.R. Rep. No. 1107, 93d Cong. 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 7706.

The District Court recognized that the State of Minnesota, by enacting its Lemon Law, "seeks to further the congressional goal of protecting consumers by enhancing the protections established by Magnuson-Moss." Pet. App. 30a. The Eighth Circuit echoed this sentiment, stating "By enacting the Mag-

nuson-Moss Warranty Act, Congress has increased the economic strength of consumers. . . . Congress intended state regulation, like the Minnesota Lemon Law, to operate with the Warranty Act in a mutually supplementary manner. The Minnesota law does nothing to defeat this result." Pet. App. 17a.

Moreover, there is a sound explanation for the legislative explosion of state Lemon Laws which petitioners bemoan. Pet. 24. Magnuson-Moss was enacted in 1975. During the seven year interim between 1975 and 1982, only *one* auto manufacturer (Chrysler Corporation) purported to offer an arbitration program that satisfied even the "minimum requirements" of Rule 703. 54 Fed. Reg. 21070 (May 16, 1989). The enactment of the first Lemon Law in 1982, and the subsequent enactment of more than forty Lemon Laws, represents the states' response to this regulatory void. A roll-back of state legislation in this area would leave auto manufacturers free once again to offer sadly inadequate arbitration programs or no programs at all.

Sprinkled throughout the manufacturers' petition are references to the costly additional requirements imposed by Minnesota and other states. Pet. 20-21, 25. As noted by the District Court below, the petitioners' cost arguments have no basis in fact. Pet. App. 32a. It should be noted that the auto manufacturers elected to withdraw their taking claim on appeal to the Eighth Circuit. Pet. App. 6a.

In sum, the State of Minnesota asserts that the vehemence of the manufacturers' opposition to the lemon law is a testimony to the statute's effectiveness. It does indeed provide increased economic strength to consumers and is therefore fully in accord with the purpose and spirit of Magnuson-Moss.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

AUTOMOBILE IMPORTERS OF AMERICA, INC., *et al.*,
Petitioners,

v.

STATE OF MINNESOTA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

The Eighth Circuit, declaring its intent to follow the lead of the Fifth Circuit rather than the Fourth Circuit, has held that the Magnuson-Moss Warranty Act and relevant Federal Trade Commission regulations do not preempt various provisions of the Minnesota motor vehicle warranty law regulating informal dispute resolution mechanisms. In their opposition, respondents largely reprise the reasoning of the Eighth Circuit, arguing that the court properly read the Act and regulations as establishing a floor above which the States are free to legislate. Br. in Opp. at 9 & 10. Although we have detailed our reasons for thinking this view incorrect, a few additional comments seem appropriate.

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* Pursuant to Supreme Court Rule 28.1, a list of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of all corporate parties appears in the appendix to the petition at Pet. App. 80a.

1. As we noted in our petition, the Eleventh Circuit has held that it is inappropriate to employ a strong presumption against the implied federal pre-emption of state law. *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989). Respondents argue, however, that, in the field of "consumer protection," such a presumption is entirely proper: state law favoring consumers must stand unless there is a "clear statement" by Congress of its intent to pre-empt.[1] We think this approach gives too little deference to national interests.

No one disputes that States play an important role in regulating the dealings between suppliers and consumers. But it hardly follows as a matter of course that varied (and often inconsistent) regulation by 50 different States will improve upon a federal regulatory scheme. If Congress or a federal agency seeks to strike a compromise between competing interests, or if those bodies choose to leave the development of standards to the private marketplace, the federal program by its nature may simply preclude any additional state regulation. *See City of New York v. Federal Communications Comm'n*, 486 U.S. 57 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986). Similarly, Congress or an agency may choose to provide options that States would prefer to foreclose. *See Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153

[1] Respondents attempt to restrict *Taylor*'s rule to cases involving implied pre-emption of state laws that *conflict* with federal law. Br. in Opp. at 10-11. But while the Eleventh Circuit had no occasion to consider whether Congress had "occupied the field" at issue there, the court articulated its holding in much broader terms than respondents admit. *See Taylor v. General Motors*, *supra*, 875 F.2d at 826. Indeed, the Eleventh Circuit drew a single distinction: between express pre-emption and implied pre-emption. *Id.* Respondents' effort to draw nicer lines among the sub-species of implied pre-emption—to discern apples and oranges where only apples exist—fails to limit *Taylor*'s scope. Respondents offer no good reason for distinguishing "field pre-emption" from "conflict pre-emption" for purposes of the "clear statement" rule that they advocate.

(1982). In such circumstances, the fact that a state law may be characterized as protecting consumers does not mean that, without a clear statement to the contrary, federal law must be presumed to give way.[2]

This case, in fact, makes apparent the difficulties that such a presumption would create. As we noted in our petition, the Magnuson-Moss Act, its legislative history, and subsequent regulations all indicate that Congress and the FTC deliberately balanced the interests of consumers, warrantors, *and states* as part of the federal scheme. *See* Petition at 12-19. Moreover, although concededly falling within the broad category of "consumer protection," this federal regulation did not interfere with any state activities: in 1975, when Congress passed the Magnuson-Moss Act, *no* State regulated warranty arbitration Mechanisms. (Indeed, no State enacted such legislation until 1982.) This is not a case, therefore, where Congress would have had special concerns about preserving a historical framework of state regulations. Rather, Minnesota simply came late to the regulation of Mechanisms and decided that it prefers its own scheme to the one envisioned by Congress.

Respondents may think it wise to incorporate a "clear statement" rule into implied federal pre-emption analysis, but the rule is not part of the familiar test that this Court presently uses. *See Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1273 (1989). In our view, such an innovation would too read-

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[2] Respondents agree with the Eighth Circuit that the Minnesota law at issue does not conflict with FTC regulations, and thus is not pre-empted impliedly by the Magnuson-Moss Act. Br. in Opp. at 12. Like the Eighth Circuit, respondents offer little to support this conclusion other than the observation that "[s]trictly speaking," a warrantor can satisfy both State and FTC by complying with Minnesota's more rigorous regulations. *Id.* But, as we have noted, a state law may conflict with the purposes of federal law even though it is physically possible to comply with both. *See* Petition at 19-24.

ily permit States to assert their own interests at the expense of national concerns.[3] But whatever the arguable merits of a "clear statement" rule, the Eighth Circuit's attempt to engraft it onto existing pre-emption analysis only heightens the need for the Court to resolve the issues presented here.

2. The federal courts that have addressed the issue have disagreed over whether the Magnuson-Moss Act and FTC regulations pre-empt state regulation of automobile warranty Mechanisms. *See* Petition at 8-9, 13-14. The Fourth Circuit has held that the Act and regulations do pre-empt; the Fifth Circuit has held that they do not, at least with regard to state-operated Mechanisms. *Compare Wolf v. Ford Motor Co*, 829 F.2d 1277 (4th Cir. 1987), *with Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985). On its way to upholding Minnesota's Lemon Law, the Eighth Circuit declined to adopt the view of the Fourth Circuit that the Act and regulations left no room for state regulation. *Wolf v. Ford Motor Co., supra*, 829 F.2d at 1279. Instead, the Eighth Circuit announced that it "agree[d] with the Fifth Circuit . . . that Congress has not fully

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[3] The presumption against implied pre-emption that underlies the "clear statement" rule would plainly hamper Congress' ability to preclude *all* government regulation—state and federal—within certain areas. This Court has recognized that a " 'federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.' " *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., supra*, 474 U.S. at 422 (emphasis in original). Up to now, this Court has exhibited a willingness to draw "the pre-emptive inference" where a comprehensive federal scheme "leaves a portion of the regulated field without controls." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1355 (1988). Under respondents' proposed rule, however, federal inaction within any portion of that regulated field would invite supplementary state regulation, absent explicit congressional pre-emption.

occupied the area of informal dispute resolution mechanisms." Pet. App. 10a.

Respondents' efforts to smooth over this conflict are unconvincing. *See* Br. in Opp. at 15-17. Their main argument is that the Fourth Circuit in *Wolf* addressed the pre-emptive effect of the Act on a state *common law* fraud action (as opposed to a state statute). Br. in Opp. at 17. But this distinction lacks substance. The familiar federal pre-emption analysis does not change depending on whether the state law at issue derives from statute or common law. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (federal Clean Water Act held to pre-empt state common law nuisance action); *Taylor v. General Motors Corp., supra*, 875 F.2d at 827 (holding that National Traffic and Motor Vehicle Safety Act pre-empts state common law products liability action); *see also Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989) (same); *Wood v. General Motors Corp.*, 865 F.2d 395, 412-13 (1st Cir. 1988) (same); *cf. Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). And the basic contradiction between the Eighth Circuit's rationale in this case and the Fourth Circuit's decision in *Wolf v. Ford Motor Co., supra*, is neither cured nor rendered academic merely because the latter considered state regulation rooted in common law rather than statute. Thus, there is a genuine conflict among the Circuits that warrants a grant of the petition in this case.[4]

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[4] Respondents also contend that their law regulating private Mechanisms is somehow akin to the state-operated Mechanisms at issue in the *Chrysler* case before the Fifth Circuit. *See* Br. in Opp. at 16. The Fifth Circuit, however, drew a clear distinction between Mechanisms established by States themselves and those established by warrantors, finding only the former not to be pre-empted. *See Chrysler Corp. v. Texas Motor Vehicle Comm'n, supra*, 755 F.2d at 1206. Minnesota regulates only the latter.

3. Respondents urge this Court to conserve its resources and deny the petition because the Second Circuit "may soon have an opportunity" to rule on the question presented here. Br. in Opp. at 18. It is true that the Second Circuit may soon have before it the decision in *Motor Vehicle Mfrs. Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988), in which a district court held that the Magnuson-Moss Act and the FTC regulations reflected a "clear intent that the federal regulations govern the mechanisms exclusively" and thus pre-empted New York regulations affecting warranty dispute Mechanisms. *Id.*, 697 F. Supp. at 736. *See* Petition at 13-14. But this hardly seems a good reason to delay resolution of the issue presented here. Whether the Second Circuit sides with the Fourth Circuit or with the Fifth and Eighth Circuits, a conflict among the Circuits will continue to exist.[5]

Respondents' proposal also ignores the cost of the delay that it advocates. It remains undisputed that the Magnuson-Moss Act sought to achieve at least some measure of national uniformity among standards governing informal Mechanisms to resolve consumer warranty disputes. The FTC deliberately tailored its regulations implementing the Act "to foster a variety of Mechanisms, including national ones . . . ." FTC Statement of Basis & Purpose, 40 Fed. Reg. 60,190, 60,209 (1975).[6] It is

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[5] Respondents maintain that this Court's ultimate resolution of the pre-emption question will "benefit [from] further discussion and analysis by the Second Circuit." Br. in Opp. at 18. Respondents do not, however, suggest that the record or prior proceedings in the case at hand are inadequate to allow this Court to resolve the pre-emption question now.

[6] Respondents argue (Br. in Opp. at 13-14) that there is no inconsistency between "encouraging" and "mandating" Mechanisms and that petitioners appear to have so indicated in the New York proceedings. What respondents miss, however, is the distinction between means and ends. There is no doubt that Congress wanted Mechanisms to become increasingly available to consumers, but, as

hardly consistent with these federal policies to perpetuate —indeed, to encourage—division among federal courts on the question whether the Magnuson-Moss Act pre-empts state regulation of warranty dispute Mechanisms.

Respondents themselves emphasize that more than forty States have enacted legislation to regulate Mechanisms since the first "Lemon Law" appeared in 1982. Br. in Opp. at 20. These statutes vary widely from State to State and almost without exception diverge from the standards established by the FTC. *See* Petition at 24-25. Warrantors attempting to operate the national Mechanisms that Congress and the FTC meant to encourage will continue to incur the costs of multiple and conflicting state regulation even while the States' authority to regulate remains at the center of a continuing conflict among federal courts. That prospect argues against further delay, not for it.

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we explained in our petition, Congress established a voluntary scheme to achieve that goal, not an involuntary one. *See* Petition at 22-23. State regulation that overrides that decision—even in quest of a similar objective—is simply inconsistent with the federal program. *See City of New York v. Federal Communications Comm'n, supra* (city cannot promulgate additional regulatory standards regarding quality of cable signals).

CONCLUSION

For the reasons stated here and in the foregoing petition, petitioners pray that this Court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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